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No. 2997

United States
Circuit Court of Appeals
For the Ninth Circuit.

DIAMOND PATENT COMPANY (a corporation),
Appellant,

vs.

WEBSTER BROS. (a corporation) and C. F. MURRAY, *et al.*,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No.

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INDEX.

Names and Addresses of Attorneys.

For Plaintiff and Appellant:

J. J. SCRIVNER, Esq., 57 Post St., San Francisco, Cal.;

G. E. HARPHAM, Esq., 1001 Washington Building, Los Angeles, Cal.

For Defendants and Appellees:

M. G. GALLAGHER, Esq., Fresno, Cal.

In the United States District Court for the Southern District of California, Northern Division.

DIAMOND PATENT COMPANY,

Plaintiff,

vs.

WEBSTER BROS., a corporation,

Defendant.

A 55 Equity.

DIAMOND PATENT COMPANY,

Plaintiff,

vs.

C. F. MURRAY, *et al.*,

Defendants.

A 60 Equity.

Consolidated.

It is hereby stipulated that in printing the record on appeal to the Circuit Court of Appeals for the Ninth Circuit that the bill of complaint in the action against Webster Bros. need not be printed in full but shall give heading and state as follows: "Bill of complaint for infringement of patent, injunction and accounting in same form as the bill against C. F. Murray *et al.* except as to third paragraph, which alleges the incorporation of defendant under the laws of California and principal place of business at Fresno, Cal. And also excepting that infringement is charged by use of cases alone."

That in all other papers the formal headings, giving title of court and names of parties, shall be omitted.

That the petition for appeal need not be printed in full but shall state: "Petition for appeal in due form filed Jany. 30th, 1917, and allowed by order of court;

entered Jany. 30th, 1917, on filing an undertaking on appeal for $500.00, and need not be printed in the record."

That the undertaking on appeal, in due form, was given and approved by Judge Trippet and filed Feby. 1st, 1917, and need not be printed in the record.

It is stipulated that an order allowing the withdrawal of the original exhibits and their transmittal to the Court of Appeals was signed by Judge Trippet and filed Feby. 26th, 1917, and such order need not be printed in the record.

It is stipulated that a citation on appeal was duly issued and served and need not be printed in the record.

J. J. SCRIVNER &
G. E. HARPHAM,
Attorneys for Plaintiff.
M. G. GALLAHER,
Attorney for Defendants.

In the United States District Court, in and for the Southern District of California, Northern Division.

DIAMOND PATENT COMPANY (a corporation),
Plaintiff,

vs.

CHAS. F. MURRAY and ROY C. MURRAY, co-partners under the firm name of MURRAY CABINET AND SHOW CASE CO.,
Defendants.

Bill of Complaint for Infringement of Patent, Injunction and Accounting.

To the Judges of the District Court of the United States, for the Southern District of California:

Now comes the plaintiff above named and for cause of action against the defendant herein alleges:

I.

That the Diamond Patent Company (your orator) was at all times since February 4th, 1910, and still is a corporation, duly organized and existing under the laws of the state of California, and having its principal place of business at the city and county of San Francisco, in said state.

II.

That defendants Chas. F. Murray and Roy C. Murray are copartners in trade, doing business under the firm name of Murray Cabinet & Show Case Co., at the city of Fresno, county of Fresno, state of California, and reside in said city of Fresno.

III.

That the jurisdiction of this court in this suit depends upon its arising under the laws of the United States relating to patentable inventions, as will more fully hereinafter appear.

IV.

That, upon due application therefor in writing made and filed in the patent office of the United States by one Fred. Weber, on the 3rd day of October, 1904, valid letters patent of the United States No. 801,944, dated and issued October 17th, 1905, were duly granted to the said Fred. Weber, of the city of Los Angeles, county of Los Angeles, state of California, under and

in pursuance of the then existing statutes of the United States, for certain improvements and discoveries in "show cases," which said letters patent were duly delivered to and accepted by the said Fred. Weber, and the same or a duly authenticated copy thereof are ready to be produced in court and are hereby referred to and made a part hereof.

V.

That said patent was issued for a new and useful invention, which was never before known, or used before the invention thereof by the said Fred. Weber; That said inventions described in said patent were not known or used by others in this country, or described in any printed publication in this or any foreign country before the invention or discovery thereof by the said Fred. Weber, for more than two years prior to his application for letters patent therefor, and no application for any foreign letters patent therefor had been filed more than seven months prior to the application for letters patent therefor in this country, and said inventions had not been in public use, or on sale in the United States for more than two years prior to the application of the said Fred. Weber for a patent therefor, and the same had not been abandoned to the public.

VI.

That, prior to the commencement of this suit, the said Fred. Weber sold and assigned to the plaintiff corporation herein, to-wit: the Diamond Patent Company, all his right, title and interest in and to the said invention and the said letters patent therefor, and in and to all claims or rights of action for damages, gains and profits in anywise arising therefrom, or connected

therewith, and that the plaintiff then and there became, and ever since has been, and still is, the sole owner and holder of said invention and the said letters patent therefor, and the improvements described therein, and of all accrued damages and profits for any infringement thereof; and

That the said invention is of very great benefit and advantage, and that your orator and its assignor has, upon all of the show cases so made and sold by it, or by him, under said letters patent, fixed or caused to be fixed or marked thereupon the words "Patented," together with the day and year the said patent was granted, and the number thereof, thereby giving notice to the public at large that the said show cases were patented by the said letters patent. That the public have generally acknowledged and acquiesced in the aforesaid rights of your orator and its assignor, and that but for the invasion of its rights by the respondent herein complained of, your orator would continue to enjoy large gains and profits from the practice of the said invention.

VI.

That heretofore, to-wit: on or about the 6th day of August, 1908, said Fred. Weber (plaintiff's assignor) commenced an action at law in the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division, against the Southern California Hardwood & Manufacturing Company, and on said last named day the said Fred. Weber filed his bill of complaint with the clerk of said court, whereby he alleged the issuance to him of said letters patent No. 801,944, and that said Southern California Hardwood

& Manufacturing Company had infringed upon said letters patent, and prayed for damages;

That thereafter said Southern California Hardwood & Manufacturing Company appeared in said suit and filed its answer therein, wherein it denied the infringement of said letters patent, and alleged the invalidity thereof upon various and sundry grounds; upon the issues so joined, evidence and proofs were introduced by both sides, and said cause came on regularly to be heard by said court, and after argument thereon was submitted to said court for its determination;

That thereafter, to-wit: on the 19th day of July, 1909, the said court, to-wit: the United States Circuit Court for the Ninth Circuit, Southern District of California, Southern Division, rendered its decision in said suit in favor of the said Fred. Weber (plaintiff therein) and against the Southern California Hardwood & Manufacturing Company (defendant therein) and made and entered its findings of fact and conclusions of law, and the said court thereby found that the said letters patent No. 801,944, granted to the said Fred. Weber, were good and valid in law; that the defendant had infringed the same, and that said Fred. Weber (plaintiff therein) had been damaged in the sum of three thousand dollars and judgment was thereupon, on said date, entered in said cause in favor of said Fred. Weber and against the said Southern California Hardwood & Manufacturing Company, for the sum of three thousand dollars ($3000.00) and costs.

VII.

That heretofore, to-wit: on the 10th day of April, 1910, the Diamond Patent Company commenced a suit

in equity in the United States District Court for the Northern District of California, Second Division, against R. A. Pulfer, E. Levin and Frank G. Boyd, and on said last named day filed a bill of complaint with the clerk of said court, whereby it alleged the issuance to it of said letters patent No. 801,944, and that said R. A. Pulfer, E. Levin and Frank G. Boyd had infringed upon said letters patent, and prayed for damages;

That thereafter said R. A. Pulfer, E. Levin and Frank G. Boyd appeared in said suit and filed their answer therein, wherein they denied the infringement of said letters patent, and alleged the invalidity thereof upon various and sundry grounds. Upon the issues so joined, evidence and proofs were introduced by both sides, and said cause came on regularly to be heard by said court, and after argument thereon was submitted to said court for its determination;

That thereafter the said court, to-wit: the United States District Court for the Northern District of California, Second Division, rendered its decision in said suit in favor of the said plaintiff therein and against the said defendants, R. A. Pulfer, E. Levin and Frank G. Boyd, and ordered the entry of an interlocutory decree, enjoining the said defendants, and each of them, from infringing said letters patent No. 801,944: and

That thereafter, to-wit: on the 11th day of March, 1912, there was signed and entered in said suit a final decree, wherein and whereby said letters patent No. 801,944 were adjudged good and valid in law and infringed by said defendants, R. A. Pulfer, E. Levin and Frank G. Boyd; that in and by said final decree said

defendants, R. A. Pulfer, E. Levin and Frank G. Boyd, were enjoined from infringing or contributing to the infringement of said letters patent No. 801,944.

VIII.

That heretofore, to-wit: in the year 1912, plaintiff commenced a suit in equity, in the United States District Court, for the Eastern District of Washington, Northern Division, against S. E. Carr Company, a corporation, whereby it alleged infringement of said letters patent No. 801,944, and prayed for an injunction and other relief; that said S. E. Carr Company answered therein, denied infringement and set up as affirmative defenses that said letters patent were invalid upon various and sundry grounds, and particularly upon the ground that said patent was anticipated by the prior use of the inventions covered thereby, by one W. G. Whitcomb; that upon the issues so joined, evidence and proofs were introduced and said suit came on to be heard before the court on the .... day of September, 1913, and the same being argued was submitted to the court for its determination;

That thereafter the said court rendered its decision in favor of said S. E. Carr Company (defendant) and against plaintiff herein, upon the ground that said letters patent were invalid by reason of anticipation through prior use;

That thereafter plaintiff herein prosecuted an appeal from said court's decree to the Circuit Court of Appeals of the Ninth Circuit; that the parties to said cause filed their briefs in said court, and said matter was argued orally by counsel for both sides; and the same was thereupon submitted for the court's decision:

That thereafter, and on the 13th day of October, 1914, said court, to-wit: the Circuit Court of Appeals of the Ninth Circuit, rendered its opinion in writing in favor of plaintiff herein and against the said S. E. Carr Company, reversing the said lower court's decision, and found that said letters patent were valid.

IX.

That, since the granting of said letters patent, as aforesaid, and after full knowledge and notice of said letters patent, and of the invention therein described, the said defendant has infringed upon said letters patent, and each and all the claims thereof, within six years last past, by making, and causing to be made, and using and causing to be used, and selling and causing to be sold, in the Southern District of California, Northern Division, and elsewhere in the United States, show cases made in accordance with, and embodying the inventions set forth in the claims of said letters patent No. 801,944, issued to the said Fred. Weber, as aforesaid, willfully and without the consent of the said plaintiff, or its assignor, the said Fred. Weber, and plaintiff alleges:

That the said defendant is continuing to do so, and threatens to continue to do so;

Plaintiff further alleges: That said defendant has unlawfully derived large gains and profits by reason of such infringements—the exact amount of which plaintiff does not know—which amounts in equity the said defendant should account for and pay over to the said plaintiff; and that defendant has thereby caused, and is continuing to thereby cause, the plaintiff irreparable damage, loss and injury, and that plaintiff has

no plain, speedy or adequate remedy at law for the wrongs and grievances herein set forth.

Wherefore, the plaintiff prays for writs of injunction (as well preliminary and provisional as permanent) issuing out of and under the seal of this court, enjoining and restraining the defendants Chas. F. and Roy C. Murray from infringing upon said letters patent, and otherwise infringing the rights of plaintiff; that the defendants account to plaintiff for the profits made by them and the damages sustained by the plaintiff as a result of the infringing acts of defendant; and that in the decree to be rendered and entered herein, it be provided that the actual damages so assessed be trebled, in view of the willful and unjust infringement by said defendant; that plaintiff recover its costs and disbursements for this suit and have such other and further relief as may be meet in the premises;

That, upon the filing of this bill of complaint a writ of subpoena *ad respondendum* be issued and directed to the defendants commanding them to appear and answer this bill of complaint, in accordance with the rules of the court;

Plaintiff hereby waives the requirement of defendant's answering under oath.

DIAMOND PATENT COMPANY,
Plaintiff.
By James P. Shaffer,
President.

G. E. HARPHAM,
Solicitor for Plaintiff.
SCRIVNER & MONTGOMERY,
Of Counsel for Plaintiff.

Duly verified August 4th, 1916.
Filed Aug. 7, 1916, as No. A 60 Equity.

[TITLE OF COURT AND CAUSE.]

Answer.

Come now the defendants, Chas. F. Murray and Roy C. Murray, copartners under the firm name of Murray Cabinet & Show Case Co., and for answer to plaintiff's complaint herein, deny, admit and allege:

I.

Defendants deny that since the granting of said letters patent and after full knowledge and notice of said letters patent, or at all, said defendants, or either of them, has infringed upon said letters patent or upon each and all the claims thereof, or upon any claim thereof, by making and causing to be made, and using and causing to be used, and selling and causing to be sold, in the Southern District of California, Northern Division, and elsewhere, or in any place whatsoever, or in any manner whatsoever, show cases made in accordance with, and embodying the inventions set forth in the claims of said letters patent, and deny that defendants, or either of them, have ever, at any time, manufactured or sold, or caused to be manufactured and caused to be sold, any show cases whatsoever made in accordance with or embodying the inventions set forth in the claims of said letters patent, and deny that the said defendants, or either of them, is continuing to make or manufacture or sell, or cause to be made, or manufactured or sold at any time or place, any show cases made in accordance with said claims in said letters patent, or embodying the claims set forth in said letters patent, or any of them.

II.

Defendants deny that said defendants, or either of them, have derived large gains and profits, or any gains or profits by reason of such infringement or infringements; still denying that said defendants, or either of them, have ever infringed said patent or any claim thereof, and deny that defendants, or either of them, have caused or are continuing to cause the plaintiff irreparable damage, loss and injury, or any damage, or loss or injury whatsoever.

C. F. MURRAY.
By M. G. GALLAHER,
Attorney for Defendants.

Filed Sept. 25, 1916, as No. A 60 Equity.

In the United States District Court, in and for the Southern District of California, Northern Division.

DIAMOND PATENT COMPANY (a corporation),
Plaintiff,

vs.

WEBSTER BROS., a corporation,
Defendant.

Bill of complaint for infringement of patent, injunction and accounting in same form as preceding bill except 3rd paragraph, which alleges the incorporation of defendant under the laws of the state of California, and alleges that the city of Fresno, county of Fresno, is the principal place of business of defendant. Also

excepting the charge of infringement which in this bill is alleged to be done by user alone.

Duly verified May 27th, 1916.

Filed May 29, 1916, as No. A 55 Equity.

[Title of Court and Cause.]

Answer.

Comes now the defendant, above named, and for answer to plaintiff's bill of complaint herein, admits, alleges and denies:

I.

Defendant has no knowledge, information or belief as to the allegation of paragraph I of said bill of complaint, and therefore denies that plaintiff is a corporation.

II.

Defendant has no knowledge or information or belief as to the allegations of paragraphs IV, V, VI, VII and VIII, and therefore denies each and all of the allegations of all of said paragraphs IV, V, VI, VII and VIII.

III.

Defendant denies that since the granting of said letters patent, as aforesaid, or at all, and after full knowledge and notice of said letters patent, or at all, or after full knowledge and notice of the invention therein described, or at all, the said defendant has infringed upon said letters patent, or upon any letters patent, or that defendant has infringed upon each and all, or each or all the claims of said letters patent within six years last past, or at all, by making or by causing to be made,

or by using or by causing to be used, in the Southern District of California, Northern Division, or at any place, or at any time, or at all, show cases or any show case or show cases made in accordance with or embodying the inventions set forth in said letters patent, or in any letters patent whatsoever; and denies that said defendant is continuing to do so, or threatens to continue to do so, and defendant further denies that defendant has unlawfully derived large gains or profits, or any gains or profits, by reason of such infringements, or any infringement, and denies that defendant has thereby or at all, caused or is continuing to thereby or at all cause the plaintiff irreparable damage or loss or injury.

IV.

And further answering, defendant says that the bill of complaint herein fails to allege any matter or equity entitling the plaintiff to the relief prayed for therein.

Wherefore, defendant prays judgment of this court that plaintiff take nothing by reason of its complaint herein.

M. G. GALLAGHER,
Attorney for Defendant.

Duly verified July 10th, 1916.
Filed July 10. 1916, as No. A 55 Eq.

[TITLE OF COURT AND CONSOLIDATED CAUSES.]

Order Consolidating Cases No. A 60 and No. A 55.

The motion of the Diamond Patent Company made herein to have the case of Diamond Patent Company vs. Webster Bros. (a corporation), No. A 55, consoli-

dated with the case of the Diamond Patent Company vs. C. F. Murray and Roy C. Murray (a co-partnership, doing business under the firm name and style of: "Murray Cabinet & Show Case Co."), No. A 60, and both of said causes tried together as one cause, coming on regularly to be heard on this 2nd day of October, 1916, and said motion having been consented to by the defendants in open court, the same is hereby granted; and

It is hereby ordered, that the case of the Diamond Patent Company (a corporation) vs. Webster Bros. (a corporation), No. A 55, be consolidated with the case of Diamond Patent Company (a corporation) vs. C. F. Murray and Roy C. Murray (a co-partnership, etc.), No. A 60, pursuant to the statutes in such cases made and provided, and that said causes be tried together as one cause, and that the orders and proceedings heretofore had in said causes, respectively, are hereby made orders and proceedings in the consolidated causes, as they may be applicable thereto, and the evidence hereafter offered and admitted in this consolidated cause shall be treated as evidence in both, so far as applicable and subject to all legal objections thereto, and that the said consolidated causes hereafter proceed under the joint title of said cases, as above set forth.

Dated this 2nd day of October, 1916.

TRIPPET,

Judge.

Filed Oct. 2, 1916.

In the United States District Court, in and for the Southern District of California, Northern Division.

DIAMOND PATENT COMPANY (a corporation),
Plaintiff,

vs.

C. F. MURRAY and ROY C. MURRAY (a co-partnership doing business under the firm name and style of: "MURRAY CABINET & SHOW CASE CO."),
Defendants.

No. A-60.

and

DIAMOND PATENT COMPANY (a corporation),
Plaintiff,

vs.

WEBSTER BROS. (a corporation),
Defendant.

No. A-55.
(Consolidated.)

Final Decree Dismissing Bills of Complaint.

The above entitled consolidated causes came on regularly to be heard at the November term, 1916, at the city of Fresno, in the Northern Division of the Southern District of California, J. J. Scrivner, Esq., appearing as attorney for the plaintiffs, and M. G. Gallaher, Esq., appearing as attorney for the defendants in the above entitled actions. Whereupon oral and documentary testimony was introduced and the cases argued by counsel and submitted to the court for its decision. And, after due consideration thereof, it was ordered,

No. 801,944. PATENTED OCT. 17, 1905.

F. WEBER.

SHOW CASE.

APPLICATION FILED OCT. 3, 1904

Fig. 1

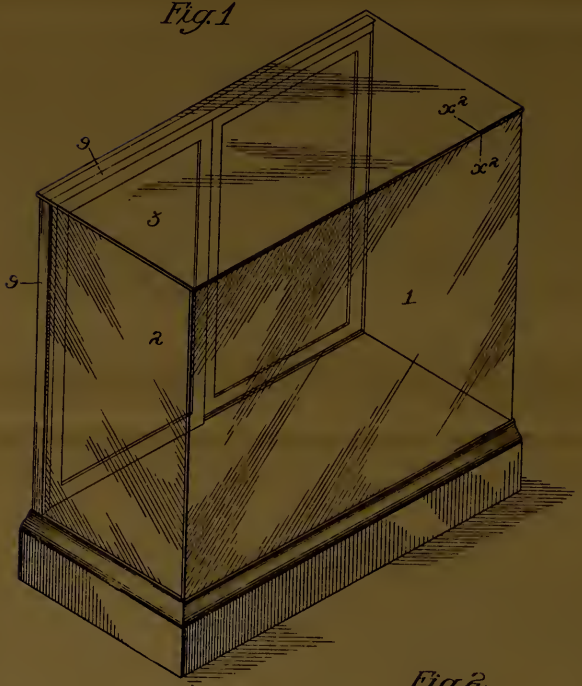


Fig. 3.

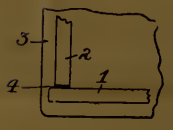


Fig. 4.

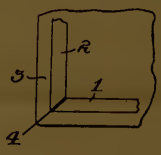
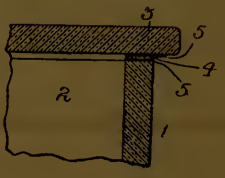


Fig. 2.



Witnesses:-

Frank L. A. Graham.

F. T. Hackley

Fig. 5.

Inventor;

Fred Weber.

by Townsend Bro.

atty.

UNITED STATES PATENT OFFICE.

FRED WEBER, OF LOS ANGELES, CALIFORNIA.

SHOW-CASE.

No. 801,944 Specification of Letters Patent. Patented Oct. 17, 1905.

Application filed October 3, 1904. Serial No. 226,882.

To all whom it may concern:

Be it known that I, FRED WEBER, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented a new and useful Show-Case, of which the following is a specification.

This invention relates to improvements in glass show-cases; and the improvement resides particularly in the means for fastening one glass surface to another glass surface or to woodwork forming part of the case.

The object of the invention is to do away with drilling holes through the glass and to dispense with metallic or other fastening devices which are commonly used at the corners for holding the plates forming the case together and to provide a fastening which will unite the parts so securely that they cannot be separated except by such stresses or blows as would break the glass before accomplishing the dismemberment, although by the use of a proper tool the parts may easily be separated.

Another object is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion-joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks received by the case.

The accompanying drawings illustrate the invention, and, referring thereto, Figure 1 is a perspective view of a show-case the plates of which are fastened together with my improved means. Fig. 2 is an enlarged sectional view on line x^2 x^2, Fig. 1. Fig. 3 is a bottom plan of a corner, showing the manner of fastening the side plates to the top. Fig. 4 is a view similar to Fig. 3, illustrating a miter-joint. Fig. 5 is a sectional view illustrating the method of fastening glass plates with an intervening strip of molding.

The invention comprises in combination with the parts to be united, such as glass or other material having a vitreous surface, a strip of yielding material, such as felt, which is interposed between the adjacent faces to be united, each face of the yielding material having a coating of cement, which forms the union between the yielding material and the surface of the adjacent part.

Referring particularly to Fig. 2, 1 designates the front plate. 2 is the side plate, and 3 is the top plate, resting upon the front and side plates with a strip of felt 4, which lies upon the top edge of the side plates 1 and 2, both top and bottom faces of the felt 4 having cement 5, which unites the plates to the felt. The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so that it will not soak into the felt. Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance. Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention.

In Fig. 3 the front plate 1 extends slightly beyond the outside face of the side plate 2, as shown, the top plate 3 preferably overhanging both the front and side plates, so as to give a neat finish to the case.

Fig. 4 shows the side plate 2 and front plate 1 united with a miter-joint with the intervening laminated felt and cement structure. This method gives a greater area of union between the front and side plates and in some cases may be preferred.

Fig. 5 shows a rabbeted molding 6, which rests upon the front plate 1, the top plate 3 resting upon the molding 6, the felt and cement structure being located between the molding and glass, as shown. A strip 7 extends along inside the plate 1, being fastened to the molding 6 by pins 8 or any other suitable means, the strip holding the plate 1 in place on the molding 6. This method of union permits easy assembling of the parts.

The construction shown in Fig. 5 enables thin glass to be used affording sufficient cementing area, the narrow thin edge alone not giving sufficient cementing area.

At the back of the case, where the glass

plates fasten to the wooden structure 9, as shown in Fig. 1, the same fastening means, consisting of the laminated structure of felt and cement, is also employed with equally good results.

The cement may be silvered, if desired, to give a neat appearance when seen through the glass, or it may be colored green, or any other color, green being preferred for both felt and cement.

Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement. This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, as in altering the structure of the case or in making repairs when one or more of the glass plates become broken. The yielding nature of the felt cushion absorbs the sharpness of shocks on the case and obviates breakage, which so frequently happens with all other forms of fastenings now known, particularly metallic corner-fastenings or structures in which a glass plate is grooved to receive the edge of another glass plate, which parts are united by cement at the groove, or show-cases in which the vertical glass plates are tightly fitted in grooved frames of wood or other material. In the latter structures severe shocks imparted directly to the front or side plates will fracture them, as a side plate has no interresiliency with the front plate or top frame; but the present invention avoids this difficulty, as there is interresiliency with both top and vertical plates which allows each plate to move relatively to the other, whether one plate alone is jarred or whether all plates are jarred simultaneously, so that each plate vibrates its own degree and direction. The effect of this is particularly noticeable at the corners formed by the junction of three plates—the top plate, a side plate, and front plate—as at the corners referred to unless perfect cushioning of each plate is provided a fracture is very likely to occur, resulting from the rigidity of the three-line joint and the unequal rate of vibration of the respective three plates and the conflicting directions or planes of vibration centering at one point, and so far as I am aware I am the first inventor to provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two, with an intervening cushion between the joining faces, to which cushion the glass plates are cemented.

What I claim is—

1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.

In testimony whereof I have hereunto set my hand, at Los Angeles, California, this 24th day of September, 1904.

FRED WEBER.

In presence of—

GEORGE T. HACKLEY,

FREDERICK S. LYON.

adjudged and decreed as follows, viz.:

Ordered, adjudged and decreed: That the bills of complaint of the plaintiffs above named be and they are each hereby dismissed, and that the said defendants do have and recover from the said plaintiffs the costs incurred by them in said suits;

It is further ordered: That the orders and decrees entered in each of said causes, and dated December 16th, 1916, be and they are hereby vacated and set aside.

Done in open court this 22 day of January, 1917.

OSCAR A. TRIPPET,

Judge.

Decree entered and recorded January 22, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

Filed Jan. 22, 1917.

[TITLE OF COURT AND CONSOLIDATED CAUSES.]

Condensed Statement of the Testimony Taken in the Consolidated Actions A 55 and A 60, Prepared Pursuant to Rule No. 75 of the United States Equity Rules.

For the purpose of establishing the case for the plaintiff, the plaintiff's counsel first introduced plaintiff's patent, issued to Fred. Weber, No. 801,944, dated October 17th, 1905, which said patent is in the words and figures following, to-wit:

(FOLDER.)

Plaintiff thereupon offered in evidence an assignment of the patent from said patentee, Fred. Weber, to the plaintiff, Diamond Patent Company, which said assignment is dated February 5th, 1910, and is in the words and figures following, to-wit:

"Whereas, I, Fred. Weber, of Los Angeles, county of Los Angeles, state of California, did obtain letters patent of the United States for an improvement in show cases, which letters patent are numbered 801,944 and bear date the 17th day of October, in the year 1905; and whereas I am now the sole owner of said patent and of all rights under the same; and whereas the Diamond Patent Company, a corporation, duly organized under the laws of the state of California and having its principal place of business in the city and county of San Francisco, of said state, is desirous of acquiring the entire interest in the same;

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of one (1) dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Fred. Weber, have sold, assigned and transferred, and by these presents do sell, assign, and transfer unto the said corporation, the whole right, title and interest in and to the said improvement in show cases and in and to the letters patent therefor aforesaid and to all rights of recovery for past infringements, the same to be held and enjoyed by the said corporation for its own use and behoof, and for the use and behoof of its legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed

by me had this assignment and sale not been made.

In testimony whereof, I have hereunto set my hand and affixed my seal at Los Angeles, in the county of Los Angeles, and state of California, this 5th day of February, 1910.

(Signed) FRED. WEBER.

(Duly acknowledged.)

(Seal)"

It was thereupon admitted that plaintiff, Diamond Patent Company, was a corporation as alleged in the complaint.

Plaintiff's counsel thereupon made his opening statement, which is as follows:

"Mr. Scrivner: If Your Honor pleases, I will now make a brief statement in explanation of this patent in order that Your Honor may now understand what we are fighting about. Litigation over this patent has been pending in various courts of the United States for a good many years. That is to say, every now and then somebody would pop up and would undertake to make these cases, and we had to show, and so far we have been successful in maintaining the integrity of the patent; but every time it comes up, the court, if it is a judge that has not tried one of them, has to understand what it is; and, if Your Honor will permit me, instead of stating it at length, myself, I will read from Judge Gilbert's decision.

The patent is for a show case to be used in exhibiting small commercial articles for sale. In the prior art there had been show cases made of wooden frames with glass plates fixed in grooves therein, and later show cases had been made of glass alone, the plates

of which were held together by metal clips, attached at the several corners of the glass plates. These not having proved satisfactory, glue or paste was inserted along the edges of the plates, which, becoming hard, assisted in holding them in place. Other show cases were made of glass with the edges of the plates glued or pasted together, and with bolts or screws inserted through the glass plates at the corners, in lieu of metal clips. Later, show cases were made all of glass by pasting or gluing the edges of the glass plates together without clips, bolts, or screws; but they were not satisfactory, for the reason that, as soon as the glue or the paste dried the joints became rigid, and, there being no vibration or yield therein, the plates were easily broken. Weber conceived the idea of inserting a strip of elastic or vibrating material between the glass plates, in order to prevent breakage in moving the same, and breakage from the expansion or contraction caused by heat or cold. In his specification he described his improvement as residing particularly in the means of fastening one glass surface to another, or to the woodwork forming a part of the case. The object of this, he said, was to do away with drilling holes through the glass and to dispense with metallic or other fastening devices, and to provide for a certain amount of elasticity of the joint, whereby a cushion effect is produced. He continued: 'If the parts were rigidly united, severe shocks received by the show case would tend to shatter the plates or displace the parts; but in the present invention the cushioned joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at

the actual union or contact spaces of the plates, thereby greatly softening the effects of shocks received by the case. * * * The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, so as not to permeate the same. By uniting with the felt, it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so it will not soak into the felt.'

There are two claims. We claim that they infringe both claims; that they have been and are now making and using show cases made—all-glass show cases. This refers to a particular show case called in the trade all-glass show case, a structure comprising a plurality of glass plates.

We claim that they have made the same case, by the insertion of a plastic or elastic cement, with felt in between the two layers of cement, exactly as described in the first claim, and we claim that that really infringes both claims, that that is itself an infringement of the second claim. Of course, it is not a very important matter, if the court finds an infringement of one claim, that is sufficient, but heretofore it has been held that a case made that way was as much an infringement of the second claim as it was of the first, because it is an elastic material. That is to say, the second claim is broader than the first claim, the first claim being limited to the insertion of a felt or its equivalent of course; while the other claim is not limited to anything except simply an elastic material, which might be a cement itself alone without any felt. That is the only difference between the two claims."

It was thereupon admitted in open court that the only issue involved in the case, to be tried and submitted to the court, was the question of infringement, or no infringement.

"The Court: Now, we will take your claims and run over them and find out where we are. Take your claim: 'A structure comprising a plurality of glass plates.' The defendants' device has that, Mr. Gallaher?

Mr. Gallaher: Yes, sir.

The Court: '—the edges of which are spaced from the adjacent plates'—your device has that?

Mr. Gallaher: Yes.

The Court: '—a felt cushion filling the space between the adjoining plates'?

Mr. Gallaher: No.

Mr. Scrivner: Now, wait. If Your Honor pleases, let us understand. They do have it, and we are prepared to show that.

The Court: They say they have not got it. '—the plates being cemented to the felt.'

Mr. Gallaher: No.

Mr. Scrivner: Yes.

The Court: Well, I am finding out what they claim. 'Each plate being adapted to freely vibrate in its natural plane of vibration.'

Mr. Gallaher: No.

Mr. Scrivner: Yes.

The Court: 'And prevented by the felt cushion from imparting its vibration to the adjacent plates'?

Mr. Gallagher: No.

The Court: Now then, I will read the second claim:

'A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate.' You have got that, Mr. Gallaher?

Mr. Gallaher: Yes.

The Court: 'Also with unconfined adjacent edge.' That is the third element—'unconfined adjacent edge.' You have that, too?

Mr. Gallaher: Yes.

The Court: Fourth. 'An elastic material filling the space thus existing between the nearest adjacent surfaces of the plates'?

Mr. Gallaher: No.

The Court: You have not got that. '4a: Said plates being attached to the elastic material'?

Mr. Gallaher: No.

The Court: 'Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.'

Mr. Gallaher: No.

The Court: Well, now, we know what we are litigating about. Now you have to prove that the defendant has 'a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.' That is the first claim. Now, the second, you have to prove, 'an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined

edges and the intervening elastic material can each vibrate or move in any direction independently.' Now, there is the issue."

MR. FRED. WEBER was thereupon sworn and examined as a witness, and testified as follows:

"I am the patentee of this patent, and an officer of the plaintiff company. I have had about eleven years' experience in the manufacture of this show case. I have made approximately up to date about 20,000 linear feet. I know that there are a great many licensees of the plaintiff scattered throughout the country. I thoroughly understand the construction and mode of operation of these cases. I have examined some of the defendants' cases. I have examined the cases at the store of Webster Drug Company, in Fresno, on the first of July; said store belonging to the Webster Bros., one of the defendants here. It was made by the Murray Company.

The Court: The defendant don't deny they are making the cases, do you, Mr. Gallaher?

Mr. Gallaher: We don't deny we are making all-glass cases, no.

The Court: The only question involved is here whether the things the defendants are making are the same things as yours.

Mr. Scrivner: Q. Now, just describe the case that you examined, what you saw, how it was built, how it was made and what it did.

A. The case is constructed with a joint between the different plates of glass, with the cushion between the plates, a cushion or a layer of felt in between the

(Testimony of Mr. Fred Weber.)

joints approximately one-sixteenth of an inch thick, with cement on both sides of the felt, cemented to the plates and holding them in position, and making the joint about one-eighth of an inch thick. They were elastic joints.

Q. What do you mean by that?

A. They would 'give' or would allow for contraction and expansion between the different plates.

. . . . . .

A. A resilient joint is simply a joint, as I understand it, that will allow for expansion and contraction.

The Court: He said these things were resilient. I want to know whether he knows what it means.

Mr. Scrivner: Now explain to the court the trouble that arises from a plat that is rigid.

A. I have done considerable experimenting in the rigid joints and I have found that the glasses would generally break on account of not being allowed to properly vibrate or expand and contract on account of the heat or cold which they received. With certain elastic material between the joints to take up what little vibration there may be, or expansion or contraction, this trouble was avoided.

A. These glass plates are generally one-fourth of an inch thick; they come in all sizes, I will say two by six feet would be an average size.

The Court: What did you do to these that you examined, to determine whether they were resilient or had vibration?

A. I put a knife blade through the joint; I cut out some of the felt.

(Testimony of Mr. Fred Weber.)

The Court: Is there any other way to determine whether or not it is a resilient joint or vibrates?

A. There is no other that I know of. The cement was plastic. It was soft enough for the knife blade to go through the joint.

Mr. Scrivner: Well, now how did that cement which you found in those joints compare with the cement that you used, in reference to its being hard or soft?

A. It appears the same; it is the same as ours, as near as I could see; the same as what we have been using. There is no difference in appearance between that and what we make under the patent. There was no apparent difference in the condition of the cement. There was no difference in the apparent condition and arrangement of the felt in the joints. I could see some of the felt; it was plain to be seen; the felt is seen on the edge here (referring to sample case).

The Court: The edges of the felt can be seen, you say?

A. Not in all cases. In some cases the edges of the felt are covered up by reason of cleaning the cement. That is, in cleaning the cases, the cement is liable to stick to the edge of the felt and penetrate the felt and it will look as though it might be all cement on the end, or on the edge.

Mr. Scrivner: Q. But in the cases which you examined which were made by the defendant, the felt was plainly visible on the outside?

A. In some instances, not all of them.

(Testimony of Mr. Fred Weber.)

Q. How many places did you put your knife through?

A. Oh; if I remember correctly, 8 or 10 different places.

Q. From your experience in the construction and handling of these cases, was the top plate removable in the manner described in your patent?

A. Yes, sir.

The Court: You will see in the patent it describes, as one of the features of the invention, that the top plates were removable with an instrument. It is no part of the claim. Nothing in the claim about it.

Mr. Scrivner: No, still it goes to illustrate the invention; if it is a rigid material you can't do it, you have to break the glass. It only tends to corroborate his theory, that it was a plastic material. Plastic material is soft.

The Court: Proceed with your questions.

"Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement." Is that what you mean?

A. Yes, sir.

The Court: This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, as in altering the structure of the case or in making repairs when one or more of the glass plates becomes broken.

Mr. Scrivner: Yes, that is what I had reference to.

Mr. Scrivner: Did you examine these cases made by

(Testimony of Mr. Fred Weber.)

the defendant in more than one store or place of business?

A. Yes, sir.

Q. What was the difference in them?

A. I have seen no difference.

Q. All apparently made alike?

A. Yes, sir.

Q. You say then, Mr. Weber, from your experience and knowledge of this matter, this whole subject matter, that these plates were adapted to freely vibrate in the natural plane of vibration and were prevented by the felt cushion from imparting its vibration to an adjoining plate, and are infringements of the patent.

A. Yes, sir.

Q. Well, you have had numerous cases—a number of them coming before the court. Are they made in the same way?

The Court: I don't see that it makes any difference about that. They admit they are making them. There is no accounting here now, and it don't make any difference now how many they were making. They admit they are making them. They are admitting they are making cases of the kind he says. The only question I see is the question you have already gone into, and that is whether what they are making is covered by your patent.

Q. Is there any means that you experts in this line of business have of determining an elastic joint, a joint or structure that the plates will vibrate in case of jars in the building, or from heat and cold and so on?

A. We have no means outside of probably a knife

(Testimony of Mr. Fred Weber.)

blade or a pin or something on that order that we might insert in the joint.

Q. Well, in the sticking of a knife blade into a joint, if the knife blade penetrates it and shows it is soft, what do you understand to be the result?

A. Well, that would be what I would consider a resilient joint.

Q. Well, it is soft, isn't it, plastic?

A. Soft, resilient.

Q. And does that act as a sort of cushion in the joint?

A. Yes, sir.

Q. So that the possible vibration of a plate of glass would be protected by this resiliency or softness of the material.

A. Yes, sir.

Cross-Examination

By Mr. Gallaher:

Q. You say the only means by which you determine that these were resilient or cushion joints was the fact that you ran a knife blade through the joint?

A. Yes, sir.

Q. If that joint had been cement, of the consistency of red brick, you could have run a knife through it, couldn't you?

A. I would not think so.

Q. If it had been lead you could have run a knife through it, couldn't you?

A. Soft lead, you could.

Q. If it had been lead of the ordinary character

(Testimony of Mr. Fred Weber.)

used from which to mould bullets you could have run a knife through it, couldn't you?

A. I don't know as to that.

Q. If it had been wood, mountain pine, you could have driven a knife through it, couldn't you?

A. Yes, sir.

Q. If it were felt with cement permeating the felt so as to make a direct conglomerate of that felt and cement, in contact with the two pieces of glass, you could run a knife through it, couldn't you?

A. I would not hardly think so, depending somewhat on the kind of cement glue that was used.

Q. You prepared, I suppose, these specifications in this patent, didn't you?

A. Yes, sir.

Q. And you said in that, if the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance?

A. Yes, sir.

Q. Thus destroying the resiliency of it?

A. Yes, sir.

Q. That was true when you said it in the specifications, wasn't it?

A. That was true. In that was meant the kind of cement that will permeate the felt.

Q. Then if this cement in these show cases that you examined was such that, when placed upon the felt, or the felt placed in the cement, was of such consistency as to permeate the felt, when that would become rigid and unite the two pieces of glass, it would

(Testimony of Mr. Fred Weber.)

be what you describe in your specifications as a rigid joint, wouldn't it?

A. If it permeated the felt, it would.

Q. And it did permeate the felt in these particular show cases you examined, didn't it?

A. No, sir.

Q. Now, you have examined exhibit marked No. 1, which I will call Defendants' Exhibit No. 1, and I believe you said that you couldn't tell whether that was a rigid joint or not.

The Court: Do you want this marked Defendants' Exhibit No. 1?

Mr. Gallaher: Yes. (To the witness.) Look at it again. Is that a rigid joint?

A. I couldn't tell without trying.

Q. Is there felt in it?

A. I can't see any.

Q. Is there wood in it?

A. There seems to be felt in this.

Q. What do you say now?

A. Let me break it apart and I can tell you.

Q. You didn't break the show cases apart, did you?

A. No, those show cases were not examined that way.

Q. We are talking about this model, Defendants' Exhibit No 1.

A. I can't see any felt in this exhibit.

Q. Is it a rigid joint?

A. No, sir.

Q. It is not. Will you demonstrate to this court

(Testimony of Mr. Fred Weber.)

how the two plates of glass move, as specified in the claim No. 2, if this was a rigid joint?

A. By inserting a knife blade in here, it would break loose.

Q. But, I want to call your attention again—I suppose you prepared the claims in this patent, didn't you?

A. Yes, sir.

Q. And you said in those claims this: "An elastic material filling the space between the nearest adjacent surfaces of glass." That would be this space in here, wouldn't it?

A. Yes, sir.

Q. "The said plates being attached to an elastic material." Are those attached to an elastic material there?

A. Yes, sir.

Q. They are not attached to each other by cement, are they?

A. This is an elastic material here.

Q. All right. Now let us see. You discovered that since I asked you the question awhile ago, but listen: "Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently."

A. Yes, sir.

Q. Now, you show the court how this one can move, over there, by this moving.

A. It is not necessary for the plates to move except in allowing for expansion and contraction.

Q. Now, answer my question. Show this court how the top plate can move towards the court without the

(Testimony of Mr. Fred Weber.)

verti*cle* plate moving towards him, whether a millionth of an inch, or an inch.

A. It can, if there is a plastic material in between there, it allows the top plate sufficiently to expand on account of the contraction or expansion by heat or cold.

Q. Will you take that and demonstrate to this court, other than by running a knife into the material of it, how it is an elastic or cushion joint? Can you press down hard enough to squeeze it together?

A. That is not—

Q. Can you do so, without absolutely breaking it, move it one millionth of an inch?

A. Yes, sir.

Q. Well, demonstrate that.

A. I have already done that here.

Q. Has it raised up any?

A. Yes, sir.

Q. How much?

A. Not much.

Q. Now I hand you here what I will offer an Defendant's Exhibit No. 2, and ask you whether or not there is felt in that?

A. I can't see any on the edge.

Q. Is there wood in it?

A. I can't see any.

Q. Is there any material between the glasses at all of any kind whatsoever?

A. There is elastic material in here.

Q. Elastic material. How do you determine it is an elastic material?

(Testimony of Mr. Fred Weber.)

A. Well, I think if this was not elastic I couldn't put the knife blade in there.

Q. Anything that you can run a knife through is elastic?

A. It is yielding.

Q. Red brick is elastic?

A. I have never tried it.

Q. A piece of granite is elastic?

A. I have not tried it.

Q. But anything you can put a knife through is elastic?

A. Yielding.

Q. Why did you provide in your patent that it was felt you were going to use?

The Court: He says in the last one there was an elastic material.

Mr. Gallaher: I hand you here what will be Defendants' Exhibit No. 3, and ask you whether or not there is any felt in that?

A. I don't think there is any felt in this.

Q. Is there any wood in it?

A. No, sir.

Q. What is in it?

A. Seems to be simply cement in there.

Q. Simply cement.

A. Yes, sir.

Q. Is that elastic or rigid?

A. This seems to be quite rigid.

Q. Quite rigid?

A. Yes, sir.

(Testimony of Mr. Fred Weber.)

Q. Now what is the difference between the rigidity of that one and of Defendants' Exhibit No. 2?

Q. Now, number two you said was a resilient joint. You discover now that that is a joint made of wood?

A. I would consider this resilient enough for the purpose.

The Court: What did you say?

A. Resilient enough for the purpose. The plates don't move up or down or sideways. It is simply to allow for contraction and vibration, which this strip of wood will.

Mr. Gallaher: But your claim then as to the plates moving was not a true claim at all.

A. The plate was never intended to move on the showcase.

Q. Now, what is the difference between number three, what will be Defendants' Exhibit No. 3 and No. 2, which you now say is resilient enough?

A. This kind of cement even, that would be resilient.

Q. That is resilient enough. Is there any wood in it?

A. There is no wood. That is resilient, allowing for expansion and contraction.

Mr. Gallaher: You don't know what the joint is composed of?

A. It is composed of that cement.

Q. No. 3. Then if that cement were put on in a state in which it would permeate the felt, it would make a rigid joint which you say in your specification would be a bad joint, wouldn't it?

(Testimony of Mr. Fred Weber.)

A. No, sir.

Q. It would not?

A. No, sir.

Q. You don't really know much about the making of these things, do you?

A. I have the first one that was ever made.

Q. And that is the sum total of your knowledge, that you made the first one?

A. I have devised the construction of something over 20,000 linear feet of that.

Q. And yours are all resilient joints, I suppose?

A. Yes, sir.

Q. If they were not, you would not regard them as worth anything?

A. Well, I wouldn't say as to that. I don't consider a solid joint a good construction, for the reason that they will break.

Q. You wrote the little advertising pamphlet, didn't you, that advertises the all-glass showcase you make?

A. Not personally.

Q. Who did write it?

A. One of our men.

Q. Have you a copy of that with you, the advertising pamphlet used by the plaintiff in this case?

Mr. Scrivner: Yes. (Hands pamphlet to Mr. Gallaher.)

Mr. Gallaher: Q. The only thing that you had in mind when you patented this was a resilient joint, wasn't it?

A. It was a joint that could be made without breaking the glass.

(Testimony of Mr. Fred Weber.)

Q. A resilient joint?

A. A resilient joint that allowed for expansion and contraction.

Q. And many of the all cement joints had been made before?

A. Yes, sir.

Q. And many rigid joints of the same kind had been made before?

A. I have never seen one to hold.

Q. But they have been made a great deal before?

A. They have been making them.

Q. I believe you state in your advertising they have been made pretty generally before?

A. I have made them, yes.

Q. And all you did was to patent the idea of the resilient joint, to overcome what you regarded the defect in the rigid joint. If this was a hard joint, that would not hold?

A. A small sample, like this, it might hold, but when you get it on a plate of the length required for these showcases, which reaches up to 12 feet, if the plate would receive a jar hard enough, it would not stick.

Q. That would be true if the cement or cushion between the two pieces of glass were of greater resistance than the glass, wouldn't it?

A. I didn't catch that.

The Court: There would be no resiliency if the material between the glass was of greater resistance than the glass, if he put something in there harder than glass, there would be no resiliency?

A. No, sir.

(Testimony of Mr. Fred Weber.)

Mr. Gallaher: Q. And, if it were harder than the glass, notwithstanding the non-resiliency, if you would strike the top plate the breakage or cleavage would stop when it came to that harder material, wouldn't it?

A. Yes, sir.

Q. And let the top glass break?

A. Yes, sir.

Q. And it would be also true, if it were not resilient, no cushioned effect at all to it, but of a less resistance, or of the resistance of red brick, that when you strike the top plate and break it, the breakage would stop at the red brick cleavage, wouldn't it?

A. If you had a hard joint, it would not.

Q. You know what red brick is, don't you?

A. Yes, sir.

Q. Supposing that it were of exactly the consistency of ordinary red brick?

A. Yes, sir.

Q. And you would strike this top piece, would you expect that the brick would break or that the side piece of glass would break?

A. I think the brick would break in that case.

Q. You say you can't make a rigid joint softer than the glass?

A. You can make it softer than the glass.

Q. How much softer?

A. I don't know to what degree.

Q. And you say in this book, however solid the joint may be, that the breakage will be there, don't you?

(Testimony of Mr. Fred Weber.)

A. I don't consider that joint solid. That is fairly rigid. This is not a hard joint.

Q. What is that composed of?

A. It is composed of a plastic cement.

Q. Examine it again and see whether it is composed of plastic cement, or not?

A. Hand me the different samples.

Q. That one I am handing you now, Defendants' Exhibit No. 4?

A. This is felt in here.

The Court: What is that?

A. This is felt in the cement.

Mr. Gallaher: Q. Now is that laminated felt and cement or it is penetrated or merged felt and cement?

The Court: Laminated would be something between—

Q. Try it with your knife and see if you find any difference in putting your knife through that and the rigid joints you have been putting it through. Quite a difference isn't there?

A. Some difference.

Q. Your knife simply goes through the felt. I will ask you whether or not that is not the Weber felt cushion joint?

The Court: What is that?

Mr. Gallaher: No. 4.

The Witness: I would consider that so.

Mr. Gallaher: Q. Now, to demonstrate to the court, I wish you would run your knife through No. 2, and don't run it through the place you did run it through before.

(Testimony of Mr. Fred Weber.)

A. It don't go as easy.

Q. Now that is a rigid joint, isn't it?

A. No.

Q. The same thing as number three?

A. I would not say positively until I saw No. 3 again.

Q. All right. Now let's see No. 3. Is it the same thing?

(Handing Defendants' Exhibit No. 3 to witness).

A. Practically, excepting it has a little more give to it, a little more cement in there.

Q. More cement in this?

A. I would think so.

Q. Or No. 5—

The Court: I don't know what you are talking about.

Mr. Gallaher: This is No. 5.

The Witness: And that is No. 3.

Q. Which has the most cement?

A. This here.

The Court: No. 5 has the most cement?

A. It looks so.

Mr. Gallaher: What is the other material there, if any, besides cement?

A. I can't see any in that. It cannot be discovered without breaking it apart.

Q. Can't be discovered without breaking it apart. Use your knife and find out. You found out what was in the cases at Webster Bros.

A. These joints are too close to put my knife in there. I don't care to break it.

(Testimony of Mr. Fred Weber.)

The Court: Run your knife through it, if you can.

A. It goes all right, only harder. That joint is not broken. It has to be resilient to do that.

Mr. Gallaher: Why do you say it has to be resilient to run a knife in there?

A. If it was solid and you put the knife in there, you are liable to break it.

The Court: Is not glass inelastic at all?

A. It is, in long lengths. You take glass four or five feet long and bend it probably half an inch, but in a small piece, the minute you bear on the edge you break it.

Mr. Gallaher: Well, now you say that the mere fact that you can run the knife through there shows that it is resilient, is that what you say?

A. That one particular one did give.

Q. If that piece of glass, if there was no cement or whatever is in there, on either plate, and the two pieces were up, like that, stationary, and there was a crack through there, you could run a knife through there, couldn't you?

A. Yes. If that was large enough you could run a knife through.

Q. Now, that is just as large as before you run the knife through, no larger or smaller. All you did was to push the cement or whatever material there was out of there.

A. Mr. Gallaher, if that cement was hard I would have broken the two pieces apart with this knife—probably the millionth of an inch.

(Testimony of Mr. Fred Weber.)

The Court: No. 5, was that?

The Witness: I couldn't say that there is any other material in there except plastic cement.

Mr. Gallaher: If there happened to be a strip of cloth in there, you don't know it?

A. I wouldn't know it, without breaking it.

Q. Now, if that was made with cement, of the consistency of which you make your case, would that cement ever become hard, I mean the cement, rigid?

A. Not for a long time.

Q. Then you mean to say that the cement which you use is resilient, not the same as this?

A. Not the same as this.

Q. Why then do you use the felt, if it makes a resilient joint without the felt?

A. Well, the strip of felt makes a more satisfactory joint. It is easier to place and you don't have to have the fitting on the glass quite so close.

Q. That is the only reason?

A. That is a very large reason. In straightening up the edges of the glass it is rather a hard job and the felt takes up the difference.

Q. Now, I will ask you again, if it is true, if you did that, that it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt?

The Court: What are you reading from, Mr. Gallaher?

Mr. Gallaher: I am reading from just below line 65 on the United States patent, in the specifications here.

(Testimony of Mr. Fred Weber.)

The Court: Page one?

Mr. Gallaher: Yes.

The Court: "The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt, it would form a hard practically homogeneous substance, thus destroying the resiliency." Is that what you are talking about?

Mr. Gallaher. That is it.

Q. Now that was true when you made the application for the patent?

A. Certain cement used at that time would make that hard.

Q. And it is true today, isn't it?

A. Certain cement would, not this cement.

Q. Not this cement. Now what cement do you mean?

A. You might take LePage's glue, or a fish glue, which is sometimes used, and if that permeates the felt, it will make it hard.

Q. Will anything else do that?

A. There may be other substances.

Q. Now, if that be true, why didn't you, when you were giving notice to the world of what could constitute an infringement of your patent, why didn't you say if the fish glue—if you used fish glue it will permeate the felt and make a rigid joint?

Mr. Scrivner: I object to that.

Mr. Gallaher: That is proper cross-examination.

(Testimony of Mr. Fred Weber.)

He has said fish glue and LePage's glue would do that. Why didn't you give notice in this patent that if a person used fish glue or LePage's it would bring about that result?

The Court: As I understand, he says those two gues would make it hard—or not make it hard?

A. Those two would make it hard.

Q. What cement were these cases made of that you examined that were manufactured by the defendant in this case?

A. Of the same cement that you have on these samples.

Q. What kind is it?

A. It is of a gummy substance.

Q. What make is it?

A. I couldn't say as to that.

Q. Is it one of the makes you have just now named that would make a hard, rigid joint?

A. No, sir, I don't think so.

Q. Why do you say that, if you don't know what cement it was?

A. I could only tell it by testing it with a knife. I couldn't say what it consists of.

Q. How long would it take the fish glue or LePage's glue you spoke of when used with the felt to become a conglomerate, hard mass and make a rigid joint, after it is put together?

A. Oh, that would take place in a very few days.

Q. How many days?

The Court: Quite a few days.

(Testimony of Mr. Fred Weber.)

Mr. Gallaher: How long would it take this cement that is used in Defendants' Exhibit 2 to harden?

A. I don't think that will ever get hard.

Q. Why don't you think so?

A. I have examined some of the cases this morning made by the defendants that have been in use for two years.

Q. Do you know if they were made with the same cement as this?

A. It looks the same.

Q. You don't know whether it is or not?

A. Well, no one can possibly tell that.

Q. Now, I suppose you mean by this notice to say that if the cement was in such a consistency as to permeate the felt, that it would destroy the resiliency—because it destroyed the resiliency of the felt, didn't you—that is what you wanted the world to understand, when you made this statement in your specifi cations.

A. That particular cement.

Q. Which particular cement?

A. I mentioned fish glue or other glue.

Q. But it says here "cement." Why didn't you say "fish glue"?

A. Well, that is all cement. You may take crockery cement, cement to cement crockery with.

Q. Now, did you know at the time you procured this patent that various cements were in themselves resilient?

A. Yes, sir.

Q. Do you know of any other way that you can

(Testimony of Mr. Fred Weber.)

determine now whether or not any of these joints that I have shown to you are resilient joints?

A. I don't know of any other way, other than what I have stated.

Q. Now, supposing that it were chalk, do you regard chalk as a resilient substance?

A. No, I would not.

Q. And if between the two layers of glass there were a piece of chalk, you would not have any trouble running your knife through it, would you?

A. No, but that is not a cement.

Q. No, but supposing that it were chalk, a layer of chalk, with layers of cement that you used, yourself, instead of using felt you would use chalk, is that what you would call a resilient substance?

A. You could not use chalk, it is impossible.

Q. Well, supposing that some foolish person would run out of felt and used a layer of chalk in the place that you used felt, would that, so long as the thing would stand up, be a resilient joint?

A. I can't imagine anybody foolish enough to try that.

Q. Mr. Weber, you understood my question, didn't you?

A. Well—

Q. Well, answer it then.

A. It is impossible, you could not.

Q. Is chalk resilient, according to your idea of mechanics?

A. I don't consider it would be, from my idea. I have never handled chalk.

(Testimony of Mr. Fred Weber.)

Q. Then, if somebody would make one of this sort, put a strip of chalk in between the two strips of cement, you could run a knife through that chalk, couldn't you?

A. But, you couldn't make a joint.

Q. You could run a knife through the chalk, couldn't you?

A. Yes, sir.

Q. And, it would not be resilient, would it, as you say chalk is not resilient?

A. If you put the chalk in that in any quantity it would be resilient.

Q. The instant the vibration came to the chalk it would stop, wouldn't it?

A. In the quantity you attempted to do it, it would be resilient.

Mr. Scrivner: Would that make a joint?

A. It could not make a joint.

Mr. Gallaher: Do you want this court to understand that, now the only way that you can determine whether a joint is resilient or a cushion joint, or not, is by using your knife and running it through the joint?

A. Well, that is the way we have done.

Q. Isn't this the real fact, that you thought that heat and cold would break the joint unless there was a layer of felt between the two layers of cement?

A. No.

Q. And, therefore, you thought that there could not be a good joint made without that cushion, felt, between them?

(Testimony of Mr. Fred Weber.)

A. The cushion felt makes the best joint. We make lots of smaller sized cases without the felt.

Q. Do you make any all-cement joints?

A. Yes.

Q. Are they resilient or rigid?

A. They are resilient, to a smaller degree.

Q. Well, then, coming back to that, do you use the same cement that you use on the top of the felt, and on the bottom of the felt?

A. Yes, sir.

Q. Why then do you warn the world not to use the cement other than by spreading it upon this cushion, if you know it would permeate and make a rigid joint?

A. By using the felt we get more resiliency on the sides of the larger case. In a small case such as six inches or a foot long, you can use the cement.

Q. Do you want the court to understand now, that, notwithstanding your specifications and claims, that this same cement that you use in making the cushion felt joint can be used without your felt or without any other substance except cement, and still be a resilient joint?

A. Yes, sir.

Q. Well, then will you explain to the court why you warned the world against using the cement and letting it penetrate the felt?

A. That is a different cement, entirely.

Q. Then, explain to the court why you didn't inform the world—

A. There are so many kinds of cement. I have only experimented with two.

(Testimony of Mr. Fred Weber.)

The Court: So far as you know, isn't that true of all cements?

A. Those I have experimented with, fish glue and also LePage's glue. I have made showcases in the experimental stage and the difference in the contraction and expansion bursted the glass, and I have known of some case manufacturers that have made similar experiments, in other parts of the country.

Q. I show you a "history of the Weber patent" and ask you to look at that and state whether or not you have read it, since that patent was issued?

A. I have read this, yes, sir.

Q. And its contents are true?

A. As near as I know. We didn't get this up.

Q. But you put it out as advertising matter. I desire to read just a part of it. "Mr. Gallaher: (Continuing) "Patent No. 801,944, issued to Fred Weber; the patent is for a showcase to be used in exhibiting small commercial articles for sale.

"Originally showcases were constructed with wooden frames having glass plates fixed in grooves in the frame. On account of the weight and appearance and for the purpose of permitting more complete display of the articles in the case, attempts were made to make an all-glass case. At first the glass plates were held together with metal clips or small bolts in the plates. Again, it was tried to glue or paste plates together without clips, bolts or screws, but on account of the rigidity of the case thus produced none of these were satisfactory to the trade. Weber conceived the ideal that an elastic or vibrating joint between these

(Testimony of Mr. Fred Weber.)

plates was essential to prevent breakage in moving, or from expansion or contraction caused by heat or cold. He attained this object by taking a piece of felt or other elastic material,"—I will just remark here that that other elastic material is covered by claim No. 2—"coating each side of the same with a thick cement, so that such cement would not permeate the felt, and it would thus retain its yielding or resilient qualities; the felt, with its coat of cement on each side, is then interposed between the edges of the plates of the showcase. The joints formed in this case have been found to prevent breakage, and in case one glass plate if broken, as by a blow, the cushion joint acts as a shock absorber, and the remaining plates will not be injured. This form of case also is easily repaired, as a thin blade can be introduced between the edges of the glass and run along the center of the felt, thus separating the plates. Commercially this is a great advantage because they can be shipped complete set up—something that cannot be done with any other all-glass case." Then there is some other matter. (Reads from Defendants' Exhibit No. 6.) Now the statement I read from the book is true isn't it?

A. That was made up by another company, not by myself.

Q. But you use it in advertising, as well as the other people?

A. No, sir.

Q. Why don't you?

A. We have no use for those books at all.

Q. Is there anything in it that is not true?

(Testimony of Mr. Fred Weber.)

A. No, I can't say that there is, to my knowledge.

Q. Then it is true that your conception was a piece of felt or other elastic material, with cement on either side of it, wasn't it?

A. My conception was to make a yielding joint, no matter how described in that book.

JAMES P. SHAFFER, called, sworn and examined as a witness on behalf of contestant, testified as follows:

Direct Examination

The Clerk: Please state your name?

A. James P. Shaffer.

Mr. Scrivner: Do you know the Diamond Patent Company, Mr. Shaffer?

A. Yes, sir.

Q. What is your relation to it?

A. I am president of the company.

Q. How long have you been such?

A. For the past 6 years.

Q. How much?

A. Six years.

Q. Have you had personal knowledge of the manufacture and sale of these showcases?

A. I am the manager of the Diamond Show Case Company, manufacturing under their license.

Q. The Diamond Patent Company owns the patent?

A. Yes, sir.

Q. And this Diamond Patent Showcase Company is the licensee?

A. Yes, sir.

(Testimony of James P. Shaffer.)

Q. And they are engaged in the manufacture of these cases?

A. Yes, sir.

Q. How long have they been engaged in that way?

A. Since 1908. The Diamond Patent Company was incorporated in 1910.

Q. Do you understand the construction and mode of operation of the case in this case, described in the Weber patent?

A. Yes, sir.

Q. Well, now, just describe it in your own way, briefly.

The Court: What is it you want him to describe?

Mr. Scrivner: The construction and operation of the patented device.

The Court: Your patent describes that. How can he add anything to the patent. The only question here involved is whether or not there is an infringement. We have settled that. Does he know anything about these showcases these people manufacture?

Mr. Scrivner. Do you know how they make them?

A. I know how they are made, from what I have investigated.

Q. Have you investigated the subject?

A. I have investigated a number of cases which they have manufactured and put out and are in use in the city of Fresno.

Q. For how long a period?

A. I can't tell exactly how long a period they have been in use. The first time that I made it a point to

(Testimony of James P. Shaffer.)

make a personal investigation of these cases was in the first part of May of this year.

Q. Can you describe how they were made?

A. They were made with a plurality of glass plates, the plates being spaced from each other with an intervening space between, with a layer of plastic cement, a layer of felt and a layer of plastic cement between intervening adjacent plates.

The Court: You say that the cases that the defendant manufactured are manufactured that way?

A. Positively, yes, sir.

The Court: It seems that makes it a prima facie case of infringement.

Mr. Scrivner: How many of those cases did you examine?

A. Well, I looked at them all. I made a personal, close examination of probably half the cases in the store, at different spaces, intervals, along the case.

Q. Mr. Shaffer, I will ask you if it has been your duty and is your duty as an officer of this plaintiff to examine all glass cases throughout the United States? To pass upon the question as to whether they were made in accordance with this patent or not?

A. Yes.

Q. How long have you been making that particular feature a part of your business?

A. Since the forepart of 1907.

Q. And how many different places here in Fresno have you examined the defendants' cases, the structure?

(Testimony of James P. Shaffer.)

A. I would say in the neighborhood of about a dozen.

Q. Well, now tell the court, in detail, what you did in order to make up your mind that these cases were made as you have said, and that they had resilient joints and were made in accordance with this patent?

A. In investigating these cases, the first principle which would apply, when we can clearly see the felt is to penetrate the joint with a knife, or an instrument similar to see whether the joint is elastic enough, soft enough in there to permit the instrument going through it. We cannot take the top off. Sometimes when we have a case in our factory we could jar it, probably, shake it, and by holding our hands on the edge of the plate we could feel the vibration of the plate, but you can't do that in a store, so the only real means left is for you to penetrate the joint, and I examined here in the matter of about a dozen different stores, and I was able to penetrate the joints in every store in some of the cases.

The Court: And that was all you did, was to just run a knife through?

A. That is all I could.

Q. Well, that is all you did?

A. Yes, sir.

JAMES P. SHAFFER, recalled as a witness on behalf of complainant for further examination, testified as follows:

Mr. Scrivner: Q. Mr. Shaffer, do you know what a rigid joint is in the showcase art?

(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Do you know what a resilient joint is in the showcase art?

A. Yes, sir.

Q. How is the difference determined, practically, I mean in the art?

A. My experience in the matter, the only way to enable you to determine, without separating the plate, would be to penetrate the joint, with a knife blade. In my experience I found that the resilient joints, the elastic joints, they are able to penetrate the joints with a knife blade, and on the rigid joints, solid joint, I was not able to do that.

Q. How long have you been carrying on your experiments in that line?

A. Ever since the first time I made a trip through the United States along in the latter part of 1906 when I started, and I have been continuously doing it ever since, making a good many trips throughout the United States and in all cities where cases were manufactured, visited large manufacturers and small manufacturers and seeing what they were making and putting on the market, and investigating to see whether they infringed the patent or whether they didn't, and making licenses to manufacturers, and taking a general survey of all the manufacturers and what they were doing in all-glass cases and other cases.

Q. Is that regarded as a safe and reliable test?

A. It has been with me, my experience, and everyone that I have come in contact with that knows anything about the cases, it has been the method followed.

(Testimony of James P. Shaffer.)

Q. What is the trouble with the rigid joint, socalled, in the art?

A. Well, I have found in the rigid joint cases, that they would not permit expansion and contraction of the glass, vibration of the glass in the showcase, and heavy trucks going along the street, and things like that, something bumped against it, people leaning against it, knocking it, or something like that, shaking it, the hauling of trucks and things, the rigid joint cases will not stand the wear and tear the elastic joint cases will.

Q. Do you know of any instance in this town of a case made by the defendants where the glasses are broken?

A. The only case in town where it is broken was one I saw the other night, in the drug company's place, which has a clamp on the cases, from my experience the break was evidently caused by the clamp.

Q. Was it made like these other cases except the clamp?

A. Yes, sir, like the Carr.

Q. Clamped case—elastic joint?

A. Yes, sir.

Q. Something like the Joplin case and Carr case?

A. Yes, sir.

Q. I am talking about this case here in town, the case in town where the glass was broken?

A. They have clamps, made the same as the patent case with the addition of another clamp.

Q. And the middle clamp caused the breakage of the glass, in your judgment?

(Testimony of James P. Shaffer.)

A. In my judgment that is what did it. It evidently did, in the case that I examined.

Q. Now, I think you testified that the defendants' cases here, that you had examined 7 or 8 of them, were elastic, in the case herein, the plastic joint?

A. Yes, sir.

Q. An infringement of the system described in this patent?

A. Yes, sir.

Q. In your judgment are infringements of both claims?

A. Yes, sir.

Mr. Scrivner: Take the witness.

Cross-Examination.

Mr. Gallaher: Q. You say the only way you have to determine whether the cushion is resilient or rigid is by thrusting a knife or other sharp instrument through the joint?

A. That is the only way you can determine in a man's store.

Q. And that is the only way you have determined, in all your experience where you found showcases in use?

A. Yes, sir, in stores.

Q. Now, you say if it is resilient that you can thrust a knife through, and if it is not resilient you cannot thrust the knife through? How do you know that?

A. My experience.

Q. When you stick the knife through you say that is resilient, don't you?

(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Why do you say that?

A. Experience has taught me I couldn't penetrate a joint, a hard joint, and if I cannot penetrate a joint with a pen knife I conceive it a hard joint.

Q. And you say you can thrust a knife through a resilient joint?

A. Yes, sir.

Q. And you can't thrust it through a rigid joint?

A. No, sir.

Q. How do you know you can't thrust it through a rigid joint?

A. From my experience that I have had.

Q. Well, what experience did you have that taught you that you can't thrust a knife through a rigid joint?

A. I traveled all over the United States and examined all kinds of cases, both elastic and rigid joints.

Q. Well, could you tell by looking at the case whether it was a resilient joint or not?

A. No.

Q. The only way you could tell was by thrusting a knife through?

A. In a man's store.

Q. If it goes through you say that is a resilient joint?

A. That is a resilient joint.

Q. Without knowing whether it moves or vibrates, the glass vibrates in its own plane, or vibrates without continuity of vibration through the joint, you simply say, if you can push a sharp instrument through it forms a resilient joint?

(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Suppose that joint were made of red brick, do you think you could thrust a knife through it?

A. I never tried that.

Q. Well, you have had experience in thrusting knives, evidently. Could you?

A. Until I try it, I would not say.

Q. Supposing it were chalk, could you thrust a knife through that?

A. If the chalk were pulverized and pasted in there—

Q. Suppose it were a square bar of chalk, thicker than a knife blade, could you thrust a knife blade through it?

A. There may be kinds of chalk—different kinds.

Q. The kind you used to write with on blackboards, could you?

A. Yes.

Q. Would that be a resilient joint?

A. Yes, sir.

Q. Why?

A. Because if it had a plastic cement on the sides it would give the resilient joint.

Q. If it had the plastic cement?

A. Sure.

Q. After all there isn't anything in that felt cushion at all, it is all in the cement?

A. Just as much in the felt.

Q. Why don't you use all cement?

A. We use the felt, principally, because in the manufacture of showcases it eliminates a lot of labor which

(Testimony of James P. Shaffer.)

is expensive. We do not have to be so particular about surfacing the edge of the plates and getting them true, removing the little bumps and things. The felt, being almost one-sixteenth of an inch thick, will take up a lot of that unevenness and do away with a lot of labor; and, also, it gives a greater degree of elasticity in there and permits of an easier operation when you come to repair it.

Q. You keep in mind all the time that this patent covered either felt or some other elastic material that was cemented on either side of the adjacent glass, don't you?

A. Yes, sir.

Q. And that is all it does cover, as far as you know?

Mr. Scrivner: That is the first claim.

A. One claim covers an elastic joint. The first covers felt or the equivalent. The second, as we make it, we use only a plastic cement.

Mr. Gallaher: Where are any of your samples of that kind?

A. I have none in town.

Q. Didn't you make any sample of that, to show to the court?

A. No, sir.

Q. In No. 1 claim it is felt. In No. 2 it is any other elastic material attached to the adjacent glass. That meant rubber or something of that kind, didn't it?

A. I didn't get that up. I don't know what the intention was.

Q. Now, your business for years has been to go

(Testimony of James P. Shaffer.)

about and see where all glass showcases are used, in business places?

A. Yes, sir.

Q. And sticking a knife through joints, if you could stick a knife through the joints.

A. Yes, sir.

Q. Did you find any in Fresno that you couldn't stick a knife through?

A. No, sir.

Q. Where have you found any that you couldn't?

A. I said I couldn't find any in those I have examined in Fresno. In defendants' cases I could stick the knife through.

Q. Elsewhere did you find any you couldn't stick a knife through?

A. I have found them in Kansas City and New York.

Q. When you can find one that you can stick a knife through, you immediately say from that and that alone that this is an infringement of our patent, don't you?

A. Yes, because it has got the elastic joint there.

Q. All right, I would like for you to explain to this court how it is that, on the one hand you say if you can stick the knife through it is resilient; and then you say it is resilient because you can stick the knife through and for no other reason. What does "resilient" mean?

A. I have no definition of it.

Q. You have no definition of it.

The Court: If you don't know what resiliency

(Testimony of James P. Shaffer.)

means, how can you testify it is resilient when you stick a knife through?

A. I mean the joints are plastic, elastic.

Q. Then resilence, in your idea, means elastic, is that it?

A. I never looked up the word, I always took it for granted.

The Court: I don't care what the dictionary says. I want to know what you mean by saying it is resilient?

A. I mean—resilient, plastic, elastic, all means the same thing, something soft in use, something I can penetrate. I couldn't penetrate concrete made of Portland cement with a knife, out here on the sidewalk, I wouldn't call that plastic.

Mr. Gallaher: Q. And the rest of your business has been, when you could run a knife through a joint, to demand a settlement of people for an infringement of your patent?

A. I would consider it an infringement of the patent and that we were entitled to bring suit against them to restrain them from making them.

Q. But that is your business, when you can find one you can run a knife through, to demand that the manufacture be discontinued, as an infringement of your patent?

A. Yes.

Q. You say that you thrust a knife through the showcases at Webster Brothers store here?

A. Yes, sir.

(Testimony of James P. Shaffer.)

Q. I believe you filed an affidavit in the preliminary hearing in this matter?

A. I believe so, yes.

Q. And in that you adopted Mr. Weber's affidavit as your affidavit, did you?

A. I am not positive of it.

The Court: The witness is entitled to see any papers he signed, offered as impeachment.

Mr. Gallaher: This is what is referred to. (Handing paper to witness.)

The Court: Is that your signature there?

A. It is printed. I presume it is.

Q. Sir?

A. It is printed here.

Q. Didn't you swear to it?

A. Yes, sir.

Mr. Gallaher: That is the copy that was served of your original.

Mr. Scrivner: There is no dispute about it, if Your Honor please.

The Court: We won't waste time on it, if there is no dispute.

Mr. Gallaher: Now, after refreshing your memory, do you remember if you thrust a knife through these, or was it Weber?

A. I thrust the knife through in the first part of May.

Q. Then you were not satisfied with that and went back again and tried it again?

A. After the defendant had sworn to affidavits

(Testimony of James P. Shaffer.)

denying it, I went back to affirm the proposition, to make sure.

Q. Then the first time you were not sure that it was a resilient joint?

A. I was sure the first time, and I was sure the second time.

Q. Now, I am going to make one more effort to get this clear. You answered Mr. Scrivner in this way, that the case was resilient—it was a resilient joint because if they were not resilient you couldn't thrust the knife through. That is true, isn't it?

A. If it is not an elastic, plastic joint you can't thrust a knife through.

The Court: You don't use the word "resilient." That is in the patent, isn't it?

Mr. Scrivner: It is not in the claims, if Your Honor please.

Mr. Gallaher: It is in the specifications.

The Court: Go ahead, Mr. Gallaher, I think you are entitled to a definite opinion of this witness, just what he means by it.

Mr. Gallaher: Now, you said if it were not resilient you couldn't thrust a knife through it, didn't you?

A. Yes.

Q. All right. Now how do you know that?

A. Experience that I have had, testing out these cases. I cannot poke a knife through a joint that is hard and solid and rigid.

Q. All right, if it is hard and solid and rigid, you can't force the knife through?

A. No.

(Testimony of James P. Shaffer.)

Q. Do you know that when it is hard and solid and rigid it is not resilient?

A. My experience with this kind of cases arose in my experience in manufacturing and seeing these cases.

Q. Well now, what shows you they are not?

A. For the simple reason that they break.

Q. Therefore, after all, the only contention that you make is that if the glass does not break within a short time, that it is a resilient joint?

A. I have no way of watching the cases continuously, to find out if the plate is going to break. I don't stand around the store for months and watch to see if the plates are going to break.

Q. I don't believe that you understand the peculiar situation with reference to that. Isn't it a fact that you determine that you can thrust a knife through it because it is resilient, instead of determining that the case is resilient by thrusting a knife through it? In other words, don't you have in mind, when you go to test a case, now, if this case is resilient I can thrust the knife through it. If it is not resilient I cannot thrust the knife through it. That is the idea with which you make the test, isn't it?

A. Yes, sir.

Q. All right. How do you determine to begin with, that if it is resilient you can do it, and if it is not resilient you can't do it?

A. By thrusting the knife through it. I have no way of determining the resiliency of the case until I test out the joints in it.

(Testimony of James P. Shaffer.)

Q. All right, and you do that by thrusting the knife through it?

A. Yes, sir.

Q. And from those premises and those alone you say your conclusion is that it is resilient, or you couldn't thrust the knife through?

A. Yes, sir.

Q. But you don't know any way in the world that you found out it was resilient?

A. I have no other way of testing a man's case out in the store. In the factory I could test it out definitely.

The Court: How would you test it out definitely in the factory?

A. In the factory, you can shake them around and jar them around and see if they will stand the jar or not.

Mr. Gallaher: Q. After all, what is really in your mind is, that a resilient joint is the only joint that will save the breakage of glass, if it breaks it is not a resilient joint, and if it does not it is a resilient joint? That is the fact?

A. If a man hits a plate of glass with a hammer we don't say it won't break, even in a patent case. We don't claim that. Or, if he runs a wheelbarrow into it, we don't. The patent claims and we claim that the elastic joint that we put in there eliminates the breakage from expansion and contraction and the ordinary little jars and things that it gets from passing trucks and things going along the sidewalk. We don't pretend to claim a case will not break if a man drops

(Testimony of James P. Shaffer.)

a hammer on it, or hits it with a hammer, or runs a truck into it, or something.

Mr. Gallaher: Now, I think I am getting to understand you. You claim if it is a resilient joint, the difference in the temperature in a room, the expanding and contracting of the glass will not break the glass, don't you?

A. If it is a resilient, elastic joint.

Q. Yes, and if it is not a resilient or elastic joint, that the expansion and contraction by reason of the temperature will break the glass?

A. If the temperature is so that the glass expands and contracts, it will break.

Q. Now, over here in Webster Brothers store you determined if those were rigid joints that those glasses would have been broken, didn't you, by reason of expansion and contraction of the glass?

A. Put the question again.

(Question read.)

A. If they had not had elastic joints they should have been broken.

The Court: You say they would have been broken, if they had not been elastic joints?

A. They should break from absolutely no other reason at all.

Mr. Gallaher: Then why did you have to make this knife test, if that was true?

A. For the simple reason, as I told you, that I have no means of actually knowing whether those cases had actually broken or not.

(Testimony of James P. Shaffer.)

Q. You didn't look to see whether they had broken or not?

A. I examined the joint. Those cases, he might have broken a plate by dropping something on it and he may have had it repaired, for all I know.

Q. And therefore, you had to use the knife test?

A. That is true.

Q. And that knife test has the double edged proposition to it, that if the joint is resilient, you can run a knife through—

A. Yes, sir.

Q. And you have no way of determining if it is resilient except by running the knife through?

A. Not in a man's store.

Q. And you have told this court now all that you can tell him to explain why you, as an expert witness, say that if it is a resilient joint you can run the knife blade through? You have explained it all to the court, haven't you?

A. All the reaon is that an elastic, plastic joint will permit the knife to go in, and a hard joint, I have never been able to penetrate a hard joint with my knife. I have tried it in an eastern city.

Q. How did you find out that that hard joint was not a resilient joint, when too hard to run a knife through?

A. From the fact that afterwards it came out that those cases had been breaking.

Q. Did you see any of them broken?

A. Yes, sir.

Q. How many?

(Testimony of James P. Shaffer.)

A. Oh, I don't know exactly, several of them.

Q. Where?

A. Kansas City and New York.

Q. What place in Kansas City?

A. Well, some of those down there in Joplin, Missouri, of the Federmann people; and some in Kansas City—Royal Cigar Company of New York.

Q. You saw some of Federmann's broken, didn't you?

A. Yes, sir.

Q. The Federmann people are the people you collected royalty from, aren't they?

A. That we collected royalty from?

Q. Yes.

A. We never collected any from the Federmann Company.

Q. When you went there you found some of those broken?

A. Yes, sir.

Q. And those were hard joints?

A. Yes, sir.

Q. You determined that those were rigid joints because the cases were broken?

A. I couldn't stick the knife blade in them. One is simply a vertification of the other.

Q. You don't know whether that is a rigid joint or a resilient joint, do you?

The Court: What are you showing him?

Mr. Gallaher: Defendants' Exhibit No. 3.

A. Not without trying it, I couldn't say.

(Testimony of James P. Shaffer.)

Q. The only way you have of trying it, is to run a knife through.

A. It is pretty hard, a small piece, like this, to determine exactly whether it gives or not. You can't tell whether your plates are giving, or your hands are giving. Can we try it?

Q. It don't make any difference to me what you do. Before you make any tests will you say whether that is rigid or resilient joint?

A. I will make a test before I say.

The Court: You can't say before you make the test?

A. No.

Mr. Gallaher: All right, make whatever test you want to make.

A. It is not of sufficient size to permit it. (The witness separates plates of sample.) There is plastic cement in there sufficient to make an elastic joint.

Q. Why do you say that?

A. Because it is soft.

Q. Because the cement is soft. Does it make any difference whether that cement was put in there a day ago or a year ago?

A. I cannot tell.

Q. If it was put in there a week ago would that be a rigid joint or a resilient joint?

A. If that stood, it would be a resilient joint.

Q. But, if it was put in there a week ago, what would that be by the time it was marketed as a show case, resilient or rigid?

A. If that is a week old, that sample, it would be a resilient joint.

(Testimony of James P. Shaffer.)

Q. And if the layers form a resilient joint, what is there in that besides cement?

A. I didn't examine it close enough for that. If you give it back, I will take another look. (Exhibit handed to witness.) It appears to be only plastic cement.

Q. Now basing your answer upon your experience as an expert resilient joint man is this true—the cement is applied to the felt, superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state—is that true?

A. That is true.

Q. In the making of the show case under this patent?

A. Yes, sir.

Q. Is this true? If the cement were applied to the felt, so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. Is that true?

A. If the cement is of a plastic nature, it would not make—

Q. I asked you if this is true, if the cement were applied to the felt so as to permeate the same—go into the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt? Is that true?

The Court: Answer that. That is right in the patent, isn't it, Mr. Gallaher?

Mr. Gallaher: Yes.

(Testimony of James P. Shaffer.)

The Court: Show him the patent, where you were reading.

Mr. Gallaher: I was reading from just below line 65, that sentence, beginning with the word "if," ending with the word "felt." I ask you if that sentence is a state of fact?

Mr. Scrivner: If Your Honor please, I don't wish to be technical, but he has no right to go into this kind of examination at this time.

The Court: Why not?

Mr. Scrivner: Why, because he has conceded everything but the infringement.

The Court: Well, let us find out what this witness knows about these things.

Mr. Scrivner: If Your Honor desires to know that, very well; but, having admitted everything but the mere fact of the infringement, he has no right on cross-examination to take up the question of the construction of this patent, with this witness. A specification only describes one way of doing a thing, and it covers every other way of doing the same thing, and accomplishing that result. A patentee is not required to tell every way, all the details of how his invention may be prepared. The statute itself requires only that he describe the best way he knows.

The Court: He is entitled to find out what the witness knows.

Mr. Gallaher: Can you answer that question?

A. Why, if plastic cement was used with felt, the plastic cement itself would make an elastic joint. I didn't write the patent out, but in my opinion, evidently

(Testimony of James P. Shaffer.)

the inventor had in his mind a substance such as glue, or something like that, which he had had experience with and found that was the case. And I would simply say that he should have added a different word there.

Q. Now, all right, I will ask you again if the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt—is that true?

A. In some cements, yes.

Q. "The cement should be applied to the felt when quite thick, so that it will not soak into the felt." Is that true?

A. It should, yes.

Q. "Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance." Is that true?

A. Read it again, please.

Q. "Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance." "Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now is it true, in the patent, any desired form of cement may be used for that purpose?

A. Well, I would not say you could use Portland cement.

(Testimony of James P. Shaffer.)

Q. All right, is it true "any desired form of cement may be used for this purpose"?

A. As known in the show case art I would say—

Q. And is it true that any yielding or resilient substances other than felt could be employed?

A. Yes.

Q. And that is exactly what you have always understood to be meant by the second claim in the patent, isn't it?

A. Yes, sir.

Q. The first is that you could use felt for a resilient substance, and the second one, you could use any other substance?

A. I answered as to the second claim before you finished. I do not understand that the second claim covers the equivalent of felt, such as billiard cloth, or a piece of wood or rubber. I understand the second claim to cover a plastic cement, the first claim to cover the plastic cement with the felt, or the equivalent of the felt.

Q. Yes, that is what you understand it to be. That is the plain import of the thing. You testified in the case of Diamond Patent Company versus S. E. Carr Co., did you not?

A. Yes, sir.

Q. And you testified about the Federmann show cases in the Federmann drug store at Joplin, Missouri?

Mr. Scrivner: Well now, I object to reading that, unless we consider it in evidence. I am willing to that.

The Court: Ask the question, I will overrule the objection.

(Testimony of James P. Shaffer.)

Mr. Scrivner: Very well. We except.

(Question read.)

Mr. Gallaher: (Continuing.) Federmann Drug Company, in Joplin.

(Question read.)

A. I testified to the Federmann Drug Company cases, yes, sir.

Q. And did you not say in that testimony that the material used in the construction of the Federmann cases, whatever it is, permeates the felt, making a solid jointed case, which was not the case in the patent?

A. I can't tell, until I look at it again.

Q. All right. Will you look at the quotation in the testimony?

A. I did not testify to that.

Q. You didn't testify to that. However, you do say that when it permeates the felt it makes a practically solid, homogeneous matter, which destroys the resiliency of the joint?

A. With the glue that was used in those cases. The testimony that he refers to, Your Honor, is Mr. Shaffer's.

Q. Mr. C. L. Shafer. All right. Now you say that if the cement is of that resistance only that will permit the thrusting of the knife blade through the cement, that that was proof that it is a resilient material?

A. Yes, if I can thrust a knife blade through it.

Q. And which way would that cement be put on, in order to be in that condition, would it be more viscous or less viscous than that required to make what you would call a rigid joint?

(Testimony of James P. Shaffer.)

A. What do you mean by the word—

Q. Viscous?

A. Yes.

Q. Tough, it would mean of a more substantial consistency, less watery, less liquid.

A. You would have to keep it from permeating the felt, in a laminated structure, use a heavier consistency that will not penetrate as much as in a liquid form; in a liquid, like glue, it will penetrate.

Q. All right. Now you say that you can make, of course, a joint that is all cement?

A. Yes, sir.

Q. Very well, that will hold the case together so that it can be moved about, and will contain the articles of merchandise on exhibition?

A. Yes, sir.

Q. Which joint will still be resilient?

A. Yes, sir.

Q. And also you can make one of cement, like that, which will be rigid, no resiliency whatever. That is true, isn't it?

A. Yes, sir, not with the same kind of cement.

Q. Now, if you were to get an order for an all-cement joint, one lot of cases to be all-cement, resilient joints, and the other lot of cases to be all-cement, rigid joints, what kind of cement would you use in order to make the resilient joints?

A. I would use the plastic cement.

Q. Well, what would that be, less tough, more yielding?

A. Yes, sir.

(Testimony of James P. Shaffer.)

The Court: Non-plastic?

A. It would be plastic. To make a resilient joint I would use plastic cement.

Mr. Gallaher: What do you mean by "plastic"?

A. Something that is made up with a foundation of soft gum, the foundation of plastic cement.

Q. And what would you use for the other?

A. I would not make the other.

Q. If somebody wanted to pay you $100,000.00 for a case two feet square and wanted what you describe as a rigid cement joint, what would you use for that, what cement?

A. If he was foolish enough to do it, I would probably use a thin liquid, LePage's glue, to do it, and as thin as I could.

Q. Is there any cement that you could use?

A. They call LePage's glue—they sell it, as I understand, in another form under another label and call it Russian cement, but I understand it is nothing buy LePage's glue, which is practically the same thing.

Q. Which is best, LePage's glue or the cement you speak of?

A. I didn't make it, I have no way of determining.

Q. How would you find out which one to use if you were going to make this hundred thousand dollar case?

A. From the experience I have had I would know what to buy.

Q. What is that?

A. I would say the foundation of this is of a plastic nature.

Q. Why?

(Testimony of James P. Shaffer.)

A. Because I can't crumble it up in my hand. It is sticky and yielding. After you work it around in your hand it becomes sticky and plastic.

Q. Do you want the court to understand that the specifications as used for the purpose of questions, to you, were misleading?

A. Misleading to me?

Q. Yes, misleading to the public.

A. No. I don't think that it is the intention to mislead the public. I think the inventor's intention there was to mean if you used liquid LePage's glue in the manufacture of show cases and used it in a laminated structure, putting it on that way, soft stuff in a very liquid form, it would penetrate; and if used in the right consistency it would penetrate enough to become hard, because LePage's glue becomes hard—glue becomes hard.

Q. Wouldn't anything become hard that is sufficiently liquid to permeate the felt, wouldn't it become hard if it ever made a joint at all—it would have to become hard, wouldn't it?

A. Well now, our cement permeates the felt just on the outer side of the layer, it has to take hold of the fibers.

Q. But you say in the specification and claims it must be laid on the outside of the felt, so as not to permeate it. That is correct, isn't it?

A. So as not to permeate it.

Q. It attaches to it, but does not permeate the body of the felt?

A. It is attached.

(Testimony of James P. Shaffer.)

Q. Now if anybody does make a glue that permeates the body of the felt, necessarily that makes a homogeneous rigid material?

A. Not if you use the plastic cement.

Q. Well, you say there were two ways—under claim 1, using a felt cushion; under claim 2 using some other elastic material, like rubber?

A. I did not. I put that all under claim 2.

The Court: Under claim 2 they use only cement, I understand.

A. Yes, sir.

The Court: Under claim 2 they didn't use anything but cement.

Mr. Gallaher: I think that is all.

The Court: I want to ask you—in this case here, Diamond Patent Company vs. S. E. Carr Co., it is stated: 'It is true that in the claims no specific mention is made of the nature of the adhesive substance that is used, but the claims do in effect say that the plates are so cemented to the felt that each plate is adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting this vibration to the adjacent plates. This result could not be obtained without the use of an adhesive cement that would not penetrate the cushion and destroy its elasticity and the specifications plainly call for the use of such a cement. The appellee's contention that a patentee can claim nothing beyond the terms of his claim"—it don't matter about that. Now, the last sentence: "This result could not be obtained without the use of an adjestive cement that would not penetrate the

(Testimony of James P. Shaffer.)

cushion and destroy its elasticity, and the specifications plainly call for the use of such a cement." Do you understand the patent to be that way?

A. Well, I don't get the whole meaning of it. Could I read it?

The Court: Yes, you read it. Start right in there—"It is true" and read right down there, those two sentences there. (Handing decision in the case cited to witness.)

A. It is pretty hard for me to answer that yes or no.

The Court: Well, make any explanation you desire.

A. In the beginning of the manufacturing of show cases, experiments carried on at the beginning were with liquids, such as LePage's glue, and fish glue and such things, and it was found there that where you used a porous substance like we were using at that time, a very thin felt, or thin porous felt, that it would penetrate and make a hard joint, which would break, and we tried to manufacture it and couldn't that way. Then we took a plastic cement, and since we started to manufacture with plastic cement, in these later years we have discovered that where we used plastic cement, even with ground up felt, you are practically getting a half-way proposition from the first claim and the second claim, putting the ground up felt in the plastic cement that would give us a yielding joint that would stand up and perform all the functions of the first or second claims.

The Court: What is a plastic cement?

A. A plastic cement as used in show cases is a cement which has a foundation of yielding substances,

(Testimony of James P. Shaffer.)

incorporates a soft gum that does not become brittle in its natural state.

Q. Soft and yielding, is that the idea?

A. Not soft and yielding like putty, and neither is it hard, like concrete, but it comes to a sort of rubber substance.

Q. What kind of cement is that? What is it called in the trade, what name does it bear?

A. Well, so far it does not bear any, we manufacture it ourselves.

Q. You manufacture it yourself?

A. Yes, sir.

Q. For all the show case market?

A. We make it and no other manufacturer's licensees make it.

Q. How do you manufacture that? Is it a secret?

A. We have never yet advertised it, for this simple reason, other people getting hold of it would manufacture it. At the beginning, Mr. Weber used to make it, himself; and as we got more licensed manufacturers we had a paint firm make it for use, and the paint firm —I think the foreman quit and went to another place, and since then that firm has been making it and putting it out broadcast, selling it to all these people, and that is what has caused these people to infringe so much, because they have been able to get the proper kind of cement. It has caused us a great deal of trouble. It is a hard thing to overcome. Since then, when they did this—this fellow quit and did that, we started in manufacturing it ourselves, tried to overcome this fellow's sending it out broadcast. The cement is not pat-

(Testimony of James P. Shaffer.)

ented. It is made from secret things which no one knows except the inventor and the Diamond Patent Company.

The Court: That is all, for me. Call your next witness.

Mr. Scrivner: We have no other witness now, if Your Honor please.

The Court: I will look at the cases at the noon recess.

C. F. MURRAY (one of defendants), called, sworn and examined as a witness on behalf of defendants, testified as follows:

Direct Examination.

My name is C. F. Murray. I am pretty hard of hearing; I am one of the defendants in the case, and the owner of the Murray Cabinet and Furniture Company, of Fresno. We manufacture all glass show cases.

Mr. Gallaher: Q. Just explain to this court how you make the joints of those cases.

A. Well, we started—when we first commenced to make them we used a thin felt strip, about three-sixteenths wide, and we used a thin cement, which was so thin that we could—it would hardly stay on a putty knife—had to keep it rolling around when we picked it up and put the cement on the upper edge of the glass, and then laid that felt in on top of it and pressed it down, and coated it over again with the cement and then pressed it down with the natural weight of the plate, which takes care of that. And the upright cor-

(Testimony of C. F. Murray.)

ners we used a clamp to clamp it and hold it in place until the cement hardens.

Q. And did you use a strip of felt that was of equal width with the thickness of the glass?

A. No, we don't be particular about that, never cut it over a quarter of an inch wide and even narrower than that. The cement certainly does penetrate or permeate the felt, and after it is formed and set the felt and cement so mixes as to be a conglomerate mass of felt and cement. It makes a rigid joint. I never made any cases where we used a piece of felt and put on it a cement of sufficient hardness that it would not penetrate the felt. We sold some cases to Webster Brothers Drug Store in this city. I think they are in the store. The joints in those cases were made as I have described the making of joints; solid joints.

Q. What is the purpose in using a little strip of felt, wood, or anything else in connection with those joints?

A. It ain't necessary at all. We can use heavier cement, leave everything out, the felt or anything else out. It is not necessary at all.

Q. Explain what, if anything, the felt did do when you did make them that way?

A. If we put it on that way, it would simply keep it so the felt won't be forced out—I mean the cement won't be forced out, clear down, if we put in anything at all. In using that thin cement you had to put something in so it would not force the cement all out. We wanted some of it left there, sure. The only purpose in using felt or anything else in there, was because

(Testimony of C. F. Murray.)

of the unevenness of the plane, and the cement was so thin that when it was put on alone it would "squash" clear out, if it was not put in there; that was the only purpose of it. I never found any trouble with rigid joints; I never had any objection to them. I now use a more viscous or harder cement, and don't use any other material than the cement itself. I never bought any cement of Mr. Shaffer or Mr. Weber for that purpose. I don't use theirs. We did make it ourselves for awhile. I never made an all-glass show case with the cushion or resilient joint.

Cross-Examination.

I did live in Los Angeles. Never worked for Mr. Weber. I have been in his shop. I never examined his cases at all; never saw any being made. I know pretty near how they are made. He makes them with a cement just as he describes in his application; he puts the cement on both sides of the felt and lays the felt between the plates. It makes a cushion joint; I mean by "cushion joint" that the cement don't penetrate, don't meet in the center, leaves fiber in there.

Q. What is the effect of that on the glass plate?

A. I don't know, no particular effect at all, I don't think.

Q. Then there is no difference in your mind between a rigid joint and resilient joint?

A. It don't amount to a snap of your fingers.

Q. The question is, and I want you to understand it fully before you answer it—in your opinion now, as a manufacturer of all-glass show cases, is there any dif-

(Testimony of C. F. Murray.)

ference in the effect or purpose of having a plastic, resilient joint, or a solid, rigid joint?

A. I can't see how it would make any difference.

Q. Then the idea, according to your information, of putting felt in the cement at all is useless?

A. Yes, I think so.

Q. Now how did you make your joint here at Webster's store, for instance?

A. I think we used a thin felt and then cement.

Q. Now you put on first a cement, did you?

A. Yes, sir.

Q. On the edge of the plate?

A. Piled it up on the edge of the plate.

Q. Piled it up on the edge of the plate?

A. Yes, sir.

Q. That is, the side plate?

A. That is the edge of the plate or end of the plate, either one.

Q. Then you were prepared to put on your top plate?

A. Yes, sir.

Q. You piled up the cement on the edge of the plate. How thick was the plate?

A. About a quarter of an inch.

Q. You piled that up there in a cone shape, I suppose?

A. Yes, sir, in a cone shape.

Q. What did you do next?

A. Put our felt in next.

Q. On top of this?

A. Yes, we did, in this case.

(Testimony of C. F. Murray.)

Q. Now the glass is about a quarter of an inch. How wide was the felt?

A. The felt was less than a quarter of an inch.

Q. How much less?

A. We don't know. We took a pair of shears and cut it. It may vary a little.

Q. May be a little less or a little more?

A. Yes, may be a little less or a little more. We don't want it stand out.

Q. Sometimes a little more than the width of the glass?

A. Yes.

Q. And sometimes a little less?

A. Yes, sir.

Q. You paid no attention to that?

A. No, sir.

Q. A matter of no importance?

A. No, nothing particular about that.

Q. When you get the felt on top of this cone shaped cement, you put a layer of cement on top of that?

A. Yes, sir.

Q. And then what did you do, what did you do next?

A Put the plate on.

Q. Put the plate on, and then what did you do?

A. Lay the plate on and press it down.

Q. Lay the plate on and press it down until it gets down?

A. About the right force.

Q. Well, now that cement is a soft, plastic material, isn't it?

(Testimony of C. F. Murray.)

A. Yes, sir, soft material.

Q. Now, I want to know if you haven't then got an all-glass show case, having the edges of the adjacent plates—a plurality of plates, you have a plurality of plates?

A. Yes, sir.

Q. The edges of each are spaced from the adjacent plate, spaced from each other, do not jam up?

The Court: They admit that.

A. The space is taken up with the material put in.

Mr. Scrivner: A felt cushion filling the space between the adjoining plates? Haven't you a felt cushion filling the space?

A. We have a felt there, but no cushion.

Q. You have a felt?

A. Yes, we have a felt.

Q. What do you mean by a cushion, as contra-distinguished—it is made out of felt, isn't it, a felt cushion?

A. Well, it is—yes—without anything else with it.

Q. That is between the top edge of the plate and the side of the plate?

A. Yes, sir.

Q. And they push, one against the other—one pushing against the other?

A. When the felt lays in the cement, it is no cushion. After it is pressed down, it is no cushion.

Q. If the cement is soft and plastic, don't it tend to make a cushion?

A. No, sir, you can't do it.

Q. Well, you have the stuff there, anyway, the felt?

(Testimony of C. F. Murray.)

A. Yes, the stuff is there.

Q. And the upper layer of cement?

A. Yes, sir.

Q. Now what is the thickness of your felt?

A. Well, I couldn't tell you. It is very thin. You can hold it up and see right through it—ordinary, cheap felt.

Q. Now you say, in your judgment, that that plastic material with that piece of felt and another layer of that kind of plastic material on top, that it is absolutely a rigid joint?

A. Yes, sir.

Mr. Gallaher: Q. I hand you here a strip of felt and ask you whether or not you have seen that before?

A. Yes.

Q. What is that?

A. That is a piece of thick felt we took off the show case that Mr. Weber's people made.

Q. Took it off a show case the Weber people make?

A. Yes. It has their card on it.

Q. Is that the condition in which it was when you took it out of the show case?

A. Sure, only this side went to the wood, that was glued on. That is glue there.

Q. That is the famous LePage glue?

A. Yes.

Q. And the one on the other side is the cement?

A. Yes, sir. And there is the cushion joint, right there, plain, in view.

Q. And that is the felt that they specify as making a cushion joint, is it?

(Testimony of C. F. Murray.)

A. That makes the cushion joint.

Q. Now, instead of that, your cement is put on in such a state as to absolutely penetrate and permeate that felt?

A. Yes, sir.

Q. And make a solid mass?

A. Yes, sir. We never use that thick felt.

Q. Your felt is quite thin, I understand?

A. Yes, sir.

Mr. Scrivner: We desire to introduce this in evidence.

Q. Where do you get this cement?

A. Buy it.

Q. Where?

A. From Fuller & Co. We purchased a formula to make it.

Q. Have you that formula?

A. No, it is up in San Francisco.

Q. When was Fuller & Co. making that cement for you?

A. When? We used to make it ourselves for quite awhile, and then we concluded they had machinery for mixing it and could make a better cement than we could make by hand. I think we bought it from them for two or three years.

JAMES A. SMART, called, sworn and examined as a witness on behalf of defendants, testified as follows:

Direct Examination

By Mr. Gallaher:

(Testimony of James A. Smart.)

Q. Kindly state your name.

A. James A. Smart.

Q. Where do you live?

A. Fresno.

Q. What is your business?

A. Manager of the Murray Show Case Company.

Q. And how long have you been in that business?

A. Since July, beginning of July, first of July.

Q. Have you had any experience other than with that company in the manufacture of all-glass show cases?

A. Yes, sir.

Q. With whom?

A. Why, with Murray, in Los Angeles, and also with the Weber Showcase and Fixture Co.

Q. How long with the Weber Company?

A. About 6 years.

Q. And what years were they?

A. Prior to coming up here.

Q. Do you know the construction of the Weber show case?

A. Yes, sir.

Q. Explain to the court the construction of the joint in the Weber show case.

A. The construction of the joint is absolutely as—

Mr. Scrivner: I object to that, at this stage of the proceedings, as not being material.

The Court: Let us find out what this witness knows. It is for the purpose of finding out what he knows about it.

A. It follows out the pamphlet that they have, as

(Testimony of James A. Smart.)

near as possible. They use a thick felt and a thick cement, in order to form a cushion joint.

Q. What part of the joint is a cushion?

A. The felt.

Q. And is the cement put on in such a manner as to permeate the felt?

A. No, sir, it is not supposed to saturate the felt at all, otherwise it would destroy the cushion.

Q. And do you know the construction of all glass show cases made by Murray Cabinet and Furniture Company

A. Yes, sir.

Q. Do you know the construction of those in the Webster Drug Store in this city?

A. No, sir, I do not.

Q. Just explain what the construction is of the cases being manufactured by the defendant Murray Show Case Company.

A. It makes a solid joint.

Q. Well, explain how it is composed?

A. Composed of cement. In fact, they were using a real thin felt until I came up here, and I told them not to use any felt at all, to use nothing but cement, because a rigid joint of cement is just as good as felt would be.

Q. Do you know what the construction of their felt joint was that they were making?

A. They used a thin felt, they showed me they used a thin felt.

Q. What character of cement?

(Testimony of James A. Smart.)

A. Regular cement that we made. We made it for a long time.

Q. Can you say whether or not in the manufacture of their cases the cement permeated the felt?

A. Yes, sir, we endeavored to make a thin cement.

Q. And I will ask you now if it is true, in order to make a cushion joint the cement shall be applied to the felt superficially, that they put a skin, as it were, on both sides of the felt, so that the body of the felt will retain its natural state?

A. Yes, sir.

Q. Is that the way, and the only way to make the cushion joint?

A. Yes, sir.

Q. Is it also true if the cement were applied to the felt so as to permeate the felt by uniting with the felt, it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt?

A. Yes, sir.

Cross-Examination

Mr. Scrivner:

Q. What cases here in town do you know that the defendant Murray made?

A. Made the cases for the Owl Drug Store. They are made with solid joints; made with cement, not felt, in the joints. I never saw the Murray Company make any cases before I came up here. We put on the cement with a putty knife, on the upper edge of the plate.

Q. And use a piece of felt on top of that?

A. A piece of felt, on the top of that cement, and

(Testimony of James A. Smart.)

on the top of that another layer of cement that penetrates it.

Q. How do you know that it penetrates?

A. Because I can take a putty knife and penetrate it. We tried it.

Q. Is it all a hole?

A. No, sir, it is not all hole. It penetrates where the hole is; it penetrates the felt.

The Court: I thought you said awhile ago you didn't put any felt in there.

A. I did, on these samples, yes, sir. I made these samples and we did, but we manufactured it in Los Angeles. We can penetrate the felt with a putty knife.

The Court: He is asking you what you did here.

A. We use nothing but the cement now, since I have been here.

Q. Since the suit was commenced you changed the program?

A. Since I came up here. I don't know anything about when the suit was commenced. My testimony, so far as the manufacture of these show cases are concerned, only goes to that period of time, since July this year. I know nothing about what occurred prior to that time. I don't know how they were built, or what the effect was, whether solid or elastic joints.

Redirect Examination

Mr. Gallaher:

Q. For the purpose of this witness' information, I hand you Defendants' Exhibit No. 1. Did you make that?

A. Yes, sir.

(Testimony of James A. Smart.)

Q. What is that?

A. That is an all-cement, in my estimation, all cement. I would not say for sure.

Q. Would that be rigid?

A. I don't remember those—yes, sir, it should be.

The Court: Let me see that. In this No. 1 may there be a thin layer of felt in it?

A. Possibly, it is hard to tell, looking at it.

Q. If that has a thin layer of felt in it, it is so united with the felt, the cement so united with the felt that it cannot be determined from looking at it.

A. No, sir.

Q. And makes the rigid joint mentioned in the specifications?

A. Yes, sir.

Q. Is that your memory of the matter?

A. Yes, sir.

Q. Refreshing your memory from that, which is—

A. That is No. 1, Your Honor.

Q. With the thin felt, but you couldn't determine that. No. 4. I wish you would look at that and see if you can say what that is.

A. That is a cushion joint.

Q. That is a cushion joint?

A. Yes, sir.

Q. And you made that, did you?

A. Yes, sir.

Q. Which is the cushion joint. And the joint made with the thin felt permeated by the cement, as illustrated by Exhibit No. 1. This is Exhibit No. 4 of the defendant in this case.

(Testimony of James A. Smart.)

A. Yes, sir.

Q. No. 4 being a cushion joint?

A. Yes, sir.

Q. With the felt cushion there, and No. 1 being the thin felt, permeated by the cement, making the rigid joint?

A. Yes, sir.

Q. There are the two illustrations. Do you recall whether you put any other material in any of these other than—No. 2, I want to show you that. What is the composition of that joint?

A. That is wood.

Q. Wood, with the cement attached to the wood?

A. Yes, sir, making also a rigid joint.

Q. Making also a rigid joint?

A. Yes, sir.

The Court: No. 2 is wood, you say?

Mr. Gallaher: Yes, sir. I want to ask one more question. There is one of them missing, for some reason, that I didn't have yesterday. You made one of lead, did you?

A. Yes, sir.

Recross-Examination.

Mr. Scrivner: Q. Well now, you say the way you make them now you don't use any felt at all?

A. No, sir.

Q. What sort of cushion do you make?

A. Thick cement.

Q. Plastic?

A. I don't know what the word means.

Q. Soft?

(Testimony of James A. Smart.)

A. Yes soft, pliable.

Q. It gives, yields?

A. Yes, sir.

Q. Has that got any felt in it?

A. No, sir.

Q. No felt ground up and made in it?

A. I didn't make it.

Q. Do you know where you get it?

A. Yes, sir.

Q. Where do you get it?

A. Frisco.

Q. Fuller & Co.?

A. Yes, sir.

Q. You don't know how it is made?

A. No, sir.

The Court: It must have, necessarily, resilience. It is like rubber, you squeeze it together and it comes back. That means elasticity.

Mr. Scrivner: Yes, it is elastic.

The Court: That is what it says. Plastic material does not mean cement, at all. "An elastic material filling the space thus existing between the nearest adjacent surfaces of the plates." It must be an elastic material.

Mr. Scrivner: Oh, yes—in the second claim.

The Court: The first claim is felt or its equivalent. And the second claim, it must be any elastic material, the term "elastic" being used in the patent. You say, on the second claim, on the other page: "Any desired form of cement may be used for this purpose"—that is, to keep the purpose in view—about line 75. "Any

(Testimony of James A. Smart.)

desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be applied." That contemplates cement and the resilient substances.

Mr. Scrivner: It don't mean fastened or screwed to it, attached, placed on it.

The Court: Stuck on, it has got to stick—stuck in some way.

Mr. Scrivner: Yes, but, being plastic, when there is a vibration, shaking of the glass, or anything—

The Court: No use talking about "plastic" because you have "elastic."

Mr. Scrivner: Well, it means the same thing. It couldn't be elastic if hard.

The Court: I don't know about that. You can take a marble and throw it down here on this hard pavement and you can bounce it over your head easily enough; but if you go out on the asphalt and throw the marble down, it won't bounce, it sticks right there. That illustrates that asphalt is not elastic, while the concrete is elastic.

Mr. Scrivner: Well, the word "elastic" there of course has to be construed with reference to the specifications, the purpose for which it was intended. Now, in this case, we have not bothered much about the second claim, because we were prevented—

The Court: That second claim comes up in the proposition. As near as I remember you said—they claim they are not doing it now. You couldn't have an injunction if you don't prove they are now doing it.

Mr. Scrivner: Well, we don't know.

(Testimony of James A. Smart.)

The Court: He said they are not.

Mr. Scrivner: Well, our rights are to be determined on that subject by what the condition was at the time the suit was commenced. We don't know whether they have quit or not, and they might not stay quit. I think I can show Your Honor authorities on that. I want to ask him a little about the second claim. We don't waive that. We think they have infringed both, but, having proved the infringement, clearly, of the first claim, we don't consider that so very material; but, under Your Honor's suggestion it might be more so.

Q. Now you have, in what you are making now, a structure comprising a plurality of glass plates, haven't you?

A. Yes, sir.

Q. You have an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined edges?

A. Yes, sir.

Q. And an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates? What do you say to that?

A. I don't say it is elastic. When the cement gets set, it is hard, it is not elastic at all.

Q. How is it when you put it in?

A. Thin, you can use it with a putty knife, in order to cement it.

Q. How could you tell it was hard?

A. Because I have been in there since and know it is hard. It is standing in the store yet.

Q. What did you do to find out it was hard?

(Testimony of James A. Smart.)

A. I tested the edges. It has been standing in the store. The settling of the top squeezed out some of the cement, and it was perfectly hard.

Q. That which was exposed to the air was perfectly hard?

A. Yes, sir.

Q. How was it in the joint?

A. I didn't test it in the joints.

Q. Do you know what the elements of that cement are?

A. No, sir.

Q. How do you know it is not elastic, or whether it is elastic or not elastic?

A. When we put up a case we generally have some laying out on a piece of broken plate and work off that, and let it stand a time until it gets perfectly hard. That is why I say it gets hard.

Q. You don't put it in after it is hard?

A. No, sir, but generally there is some left on the glass.

Q. Did you ever try to put your knife through one of these joints that you made, that you call solid?

A. Yes, sir.

Q. Can you do it?

A. Yes, sir.

Q. Then that material will give?

A. Pushes the material out, the knife does. You can shove a knife through.

The Court: Does the material come back and fill up the space?

A. No, sir.

(Testimony of James A. Smart.)

Q. It leaves a hole?

A. It leaves a hole, yes, sir, from pushing out so much. I have seen it, it sticks together, in one position. If you shove a knife through it shoves that right out with it.

Q. Where is that show case?

A. In the Owl Drug Store.

Q. Oh, the Owl Drug Store. How could you tell that remained, when you run your knife through, the hole remained?

A. I could see the hole, by looking.

Q. How long after you put your knife in there did you look at it?

A. When I pulled the knife out.

Q. You don't know whether it filled up later or not?

A. No, sir.

Q. Now is it your idea that those glass plates, top and sides and so forth cannot vibrate without conveying its vibration to the adjoining plate, but is solid?

A. Solid, to all appearance, yes.

Q. To all appearance, but answer my question. I will read this so you can understand it: "Said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Does that condition exist in these that you make?

A. Not that I know of.

Q. You don't know whether it does or not?

A. It might be so small it would not be noticeable.

(Testimony of James A. Smart.)

Q. You can't notice any vibration in the glass plate can you?

A. You can in the large plate, yes, sir.

Q. Sometimes, you can't always, owing to the size?

A. If the size is large enough you can see it vibrate.

Q. But in a glass two feet square it would have to be a very powerful vibration, to see it?

A. Yes.

Q. The depression of the glass would be practically impalpable, you couldn't see it?

A. Yes, when it is a large plate.

Q. Then, as a matter of fact you don't know whether these plates in the cases you are making now, whether the plates by reason of their unconfined edges can vibrate or move in any direction independently of each other, you don't know whether that is so or not?

A. No, sir.

Q. If it is so, there would be a cushion joint there, wouldn't there?

A. I couldn't say.

Mr. Scrivner: You don't know.

Mr. Gallaher: That is all.

The Court: Now, gentlemen, I will meet you at one o'clock and go and see these things.

Mr. Scrivner: Now, about the procedure. I suggest that we go, take the reporter and the clerk. It won't take only half an hour, and Mr. Shaffer has been sworn, and let him point out the cases that we want to show you, all in a given building. We want him to show you that he can, with his knife blade, penetrate

these things, and show you the felt, in some cases, the edges of the felt, and just show the case as it is.

Mr. Gallaher: The court will know what the court wants to see, and we will have no trouble finding the cases.

The Court: Take the reporter, witness and clerk. Let the clerk, reporter and witness be here at one o'clock to start together.

Mr. Gallaher: And Mr. Smart, I would like to have him go along as a witness.

The Court: Anybody go that wants to.

AFTERNOON SESSION.

(At one o'clock p. m., the court, the clerk, the reporter, attorneys for the respective parties, accompanied by the witnesses Shaffer, Smart and others, proceed from the court-room to the store room of The Black Package Company, 1025 K street, Fresno, and first inspect a show case said by the proprietor, Mr. Black, to have been manufactured by the defendant Murray.)

Mr. Shaffer: You can readily put a knife in here.

Mr. Smart: (After inserting knife blade between edges of plates of case.) Sometimes they are close together, and sometimes farther apart. In the routine of manufacturing, they don't very much care, because it is not important. There is a joint there, and the cement and stuff fills it up.

The Court: Is there any felt in this?

Mr. Smart: I don't know. I wasn't here when this was made. You can't tell—

Mr. Shaffer: There is felt in this joint.

Mr. Smart: (Referring to material extracted from space between plates of glass in case.) There is some of it.

Mr. Gallaher: That is permeated with the cement. You can't find the felt.

Mr. Scrivner: (Referring to material picked out of space between plates of glass by Mr. Shaffer.) What is that you picked out there?

Mr. Shaffer: A piece of felt in its natural state. Here is another piece.

Mr. Gallaher: You say that is not permeated with the cement?

Mr. Shaffer: The cement is on the outside. When you are crumbling it this way you are crumbling the cement. It is not the felt. This case is made exactly the way the patent calls for.

Mr. Gallaher: You say that is felt?

Mr. Shaffer: That is a piece of pure cement.

Mr. Gallaher: Where is the felt?

Mr. Shaffer: You have shaken it off.

Mr. Gallaher: There is another piece. There is the whole business. If that is not permeated, I can't see. (Hands material to the court.) I will leave it to His Honor whether that felt is permeated.

Mr. Scrivner: Show that to the judge, Mr. Shaffer.

The Court: I see this case has got a wood back.

Mr. Smart: Yes, all show cases have—99% have wood in the back.

The Court: The patent does not call for it.

Mr. Shaffer: Not the claims. It don't specify that in the claims, but the show case always has the wood back.

The Court: What is the name of this store?

Mr. Gallaher: Black's Package Company, 1025 K street.

Mr. Smart: Try your knife on this, Your Honor, and see whether that is hard or not.

Mr. Scrivner: Mr. Shaffer, is that an elastic joint, within the meaning of your patent?

Mr. Shaffer: Yes, sir.

The Court: You are of the opinion it is not?

Mr. Smart: I would state the cement is absolutely hard, right here, for instance, where the knife was stuck in there. As I stated, you shove the stuff out when you put a knife in there; and there it is.

The Court: When was this put in here?

Mr. Smart: I wasn't sure, I don't know.

Mr. Weber: They tell me about two years and a half ago. That is the statement of Mr. Black, the proprietor of the store.

(From the store of the Black Package Company the court and parties mentioned proceed to the store of Webster Brothers, incorporated, at the corner of Van Ness boulevard and Mariposa street, for the purpose of inspecting the all-glass show cases therein.)

Mr. Gallaher: These are from the Murray Cabinet and Show Case Company.

The Court: What is this store?

Mr. Shaffer: Webster Brothers.

The Court: Defendants in the case.

Mr. Smart: (Referring to noise made by court rapping on show case.) You can make that noise on any case.

The Court: Mr. Murray testified there was felt in this?

Mr. Scrivner: Oh, yes, no dispute about that, in these cases.

Mr. Shaffer: Some of them you can see it on the edges, and others you cannot.

Mr. Gallaher: The only question in this case is, whether they come within the warning of the specifications. If the cement permeates the felt, it makes a rigid joint. The testimony was it was a rigid joint.

The Court: How are you going to determine whether it is a rigid joint or not? One side says it is and the other that it is not. How am I to tell?

Mr. Gallaher: Mr. Scrivner and I will help you all we can.

Mr. Scrivner: Both our witnesses testify if it is soft enough so that you can stick your knife in it that it is an elastic joint.

The Court: That is his recognition of it. Now, in the second claim it says: * * * "Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Now I don't see how a glass—that glass can move independently in any way. How can that move? It don't move, it is the vibration. Which is it, vibrate or move? It has to vibrate or move.

Mr. Scrivner: It don't mean the plate moves, Your Honor, that it—

The Court: That is a plate and this is a plate—"Whereby the plates by reason of their unconfined edges"—this edge is not confined, that is, the way I

look at it—"unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Well, now, "move in any direction"—that is a material part of the patent.

Mr. Scrivner: "Vibrate or move."

The Court: How can that glass vibrate?

Mr. Scrivner: Suppose there was an earthquake—anything that might jar this. There is very little elasticity in glass, if it is held so solid that it can't give.

Mr. Gallaher: You hit that glass, and that glass, and you will hear a vibration there, and that is the thing the patent says will not happen with their show cases.

The Court: I can feel a vibration there, all right.

Mr. Shaffer: Here is one place where you can see the felt.

The Court: He has testified there is felt in there.

Mr. Shaffer: You can see the felt there.

Mr. Gallaher: You can see this vibrate too, and that is what you say won't happen.

Mr. Shaffer: No,. If you were to take a show case and the goods were not in here and rack the whole thing, all the plates would vibrate. Then would you say—

Mr. Gallaher: If that was a true felt, you could push it a little to one side.

Mr. Shaffer: Not in our show cases.

Mr. Gallaher: You can feel it vibrate, with the finger, all right. (The court taps side glass plate of show case.)

Mr. Smart: It would naturally vibrate, on account of the wood.

Mr. Smart: There is a piece of the material I got out of that.

Mr. Gallaher: If that is not permeated, I don't know what you could call permeated.

Mr. Scrivner: What is that?

Mr. Shaffer: That is a broken top.

Mr. Smart: Are you going to take a piece of the top off?

Mr. Weber: Have you got a glass cutter?

Mr. Smart: Yes—no, I have not. I thought I had one in my pocket.

Mr. Shaffer: They have taken off that other plate. That joint has been taken off there. That is right down to the glass, but you look in there and you will see there is some thickness to it.

Mr. Smart: Here is where it proves the glass is narrower than the felt. The cement is on both sides of that.

The Court: The patent calls for the two pieces of glass to come together. I don't think this proves anything.

Mr. Smart: Just the hardness of the cement, that is all.

Mr. Gallaher: And the permeation of the felt by the cement. That is all we are trying to prove by this.

The Court: (After inserting knife blade between side and top plates of case.) That looks like there is some substance between the glass; some substance between the two glasses. (To Mr. Smart.) There is where you put your knife through.

Mr. Weber: Here is some of the material.

The Court: We will have to move along and get back to court in half an hour.

(From the store of Webster Brothers, incorporated, the court proceeded to the store of Buker & Colson Drug Company, incorporated, and there inspected an all glass show case manufactured by the Diamond Patent Show Case Company; and from the store of Buker & Colson Drug Company to the store of the Phone Drug Company, 1034 J street.)

Mr. Shaffer: This job was put in by Murray & Company, and they were paid for it—I don't know, some year or two ago.

Mr. Gallaher: Who manufactured it?

A. Murray, at least they paid the damages when we sued them.

Mr. Smart: You didn't sue them.

Mr. Shaffer: We started to, or threatened to.

(The parties next visited the store of the Owl Drug Company, on the corner of Tulare and J streets.)

Mr. Shaffer: We have some of our show cases here, and some of these are manufactured by Murray.

Mr. Smart: Some old ones here sent down from Frisco. I think I could pick out one, though.

The Court: One that you say there is no felt in?

Mr. Smart: That is made without any felt in.

Mr. Shaffer: This is one that they made. This is one that you put in when the store opened up, wasn't it?

Mr. Smart: Yes.

Mr. Shaffer: This other one you put in since?

Mr. Smart: No. They were all made at the same

time, all of them. All the cases I made, I made at the same time, excepting that little case over there.

Mr. Shaffer: Did you make the case with the sponges in?

Mr. Smart: Yes, sir.

Mr. Shaffer: And put it in at the same time this was brought in?

Mr. Smart: Yes.

Mr. Shaffer: Did you bring it in at the same time?

Mr. Smart: Not the same day.

Mr. Shaffer: Mr. Castner, manager of the store, said it was not.

Mr. Smart: Mr. Murray can say about that, himself. He helped make it. It was not put up the same day, possibly, or delivered. This cement is as hard as the rest. That is the same, absolutely the same cement. Some places the glass is closer together than others, and some places further apart. The cement is the same texture, absolutely.

Mr. Shaffer: (Removing some of the material from the space between the plates.) Here is some cement removed from the joints. When you work it with a knife—

Mr, Smart: Where did you get that?

Mr. Shaffer: In one of those cases.

Mr. Smart: Put it in the palm of your hand and heat it. If there is any substance in there, any oil, or anything like that, it will warm up. You can't get away from that.

The Court: Is there no felt in this at all?

Mr. Smart: No felt.

The Court: Did this come out of this case?

Mr. Shaffer: Yes.

Mr. Smart: There is some when it is warm. If your hand is warm and sweaty, it will warm up and get softer.

Mr. Shaffer: It is very soft, and sticks to the knife.

The Court: Can you get in there and poke some of that out?

Mr. Smart: (After complying with the request of the court and handing him the material thus obtained.) That stuff is not absolutely set yet, because the case has not been in here long enough.

The Court: How long has it been here?

Mr. Smart: Since the Owl opened up.

The Court: How long was that?

Mr. Smart: I don't just remember, about two months, I should judge. I don't remember exactly.

This case came apart here and we took it apart temporarily until we could fix it. (Removes some of the cement from inside of case and hands it to the court.) Here is some more, off the top, that I took off the top. It is not thoroughly set.

(The party here returns to the courtroom, and the following proceedings were had and the following testimony taken.)

JAMES P. SHAFFER, recalled for further examination, on behalf of complainant, testified as follows:

By Mr. Scrivner:

Q. Now, referring to that case down here at the Owl Drug Store, made by Smart, describe that again, Mr. Shaffer, state what you saw there, and how it was made, constructed and operated.

(Testimony of James P. Shaffer.)

The Witness: The case at the Owl Drug Company's store in which the different articles were, such as sponges, chamois and so forth, that merchandise, was constructed with plastic cement. I took my own knife and punctured the joint very readily, and also removed quite a little of the cement, and it was pliable by the knife, on my hand, or between the fingers. It is the same that we construct cases with under the second claim of the patent.

Q. Did you pass the material you took out of the joint over to the court?

A. I did.

The Court: You say it is a plastic material. What do you mean by that, plastic?

A. Well, it is soft enough for a knife to penetrate into it.

Q. That is what you mean by plastic?

A. Yes, sir.

Mr. Scrivner: I will ask you if that was an elastic material, elastic?

A. Yes, sir, elastic.

The Court: Now, what do you mean by "elastic"?

A. Something that will yield to penetration of a pen knife point, pen knife blade.

Q. That is your idea of what elastic means?

A. Yes, sir.

Mr. Scrivner: Was it a yielding substance?

A. Yes, sir.

Q. Or resistant—resilient?

A. Yes, sir.

Q. So that it would form, in case of the vibration

(Testimony of James P. Shaffer.)

of the plates, either one, the upper or the lower—a cushion joint, so to speak?

A. Yes, sir.

Q. What do you mean by a "cushion joint"?

A. A cushion joint is something that is soft or pliable enough to penetrate with a knife, and takes up the vibration and expansion and contraction generally, in such cases.

Q. You mean that it would give when the glass vibrated, this stuff would give and let it vibrate?

A. Yes, it would give, under expansion and contraction.

Q. So as not to break?

A. Yes.

The Court: Well, now, Mr. Scrivner, this calls for an elastic materials. I tried to explain, this morning, what the meaning of elastic material is. I suppose that is used in the common acceptation of the term. I don't know if the witness knows anything about what elastic material is, or is not. He has not qualified as a chemist—showcase man, it is true; but in order to prove that is elastic, I should think there would have to be some sort of chemical analysis of it. I have mashed it down and it stayed mashed down. There is no resiliency to it that I can see. You mash it down, and it stays where you put it. It don't seem to me like that has any elasticity to it. I think it is fair for me to say what I see about it. It is a sort of soft gum. For instance, you take a piece of chewing gum, I don't understand there is any elasticity to it. It is soft and pliable, but elasticity is a different thing from things

(Testimony of James P. Shaffer.)

that are soft and pliable, and stick. The words used are "elastic material." That is what your claim calls for. It does not call for simply a soft, yielding material.

Mr. Scrivner: Yes, but in the specifications, the description, you can determine—you have to look to that to determine what is meant by the word "elastic," and that is a yielding substance, laminated structure.

The Court: Resilient joint, "an elastic or resilient joint which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks received by the case." Now, so far as I can see from this thing, if that case has a shock that knocks it down it will stay there. I can't see how it will spring back.

Mr. Scrivner: Any desired form of yielding or resilient substance other than felt.

The Court: Where are you reading now?

Mr. Scrivner: About 75—on the second column—on the first page.

The Court: "Any desired form of cement."

Mr. Scrivner: Yes. —"may be used for this purpose and yielding or resilient substances other than felt could be employed." Now then, we will see he used the word "elastic" in the second claim.

The Court: I told you what occurred to me. It is not up for argument. This is a question of your proof.

Mr. Scrivner: Well, there is no way to prove this thing except by the opinion of an expert. Now this gentleman is an expert, and we can only prove by

(Testimony of James P. Shaffer.)

him that there is no other way to do it. Now, here is a patent, that is, for the purpose of this case, admitted to be valid and admitted to be a useful and complete proposition, covers what it says, protects this man in something, and the only issue here now is one of fact.

The Court: Sure, whether or not this thing—for instance, take this case down at the Owl Drug Store, whether that case is described in your patent.

Mr. Scrivner: Now then we say it is.

The Court: Yes. It is not up for argument now. Go ahead with the evidence.

Mr. Scrivner: Now, to go over it again, to get, maybe a better understanding, you have here this plurality of glass plates—

The Court (To the clerk): I wish you would mark this as Court's Exhibit 1. This is a piece of the substance between the glass and the show case at the Owl Drug Company's store.

Mr. Scrivner: Yes, just mark it.

The Court: He will mark it. Go ahead with your case.

Mr. Scrivner: I wanted to show it to the witness. You have there the yielding material, the unconfined edges of one plate nearly but not quite meeting the other—

Mr. Gallaher: Well, we will admit that. The court saw it.

Mr. Scrivner: I have to start somewhere. Now, the elastic material filling the space thus existing between the nearest adjacent surfaces of the plates—now, I

(Testimony of James P. Shaffer.)

call Your Honor's attention to this language in the specifications: "Any desired form of cement may be used for this purpose." I will go back a little. "The cement is applied to the felt, superfiicially, forming a skin, as it were, on both sides of the felt..... "If the cement were applied to the felt" and so forth. Pass that. "The cement should be applied to the felt" and so forth. I will skip all that. "Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now, if Your Honor please, you will notice down to the words "the yielding or resilient substance" belongs to the first claim. The whole of that has reference to the first claim. Now, the only part of the specification that applies to the second claim are the words, "any desired form of yielding cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now, that is all there is in the patent in the second claim.

The Court: You read that wrong, there is nothing about "yielding cement." It is "Any desired form of cement may be used for this purpose."

Mr. Scrivner: "Any desired form"—that belongs to the first claim,—"of cement may be used for this purpose." That is the purpose of applying it to the felt, for this purpose. That has already been described. Now, I say, the balance of that says: "and yielding and resilient substances other than felt could be em-

(Testimony of James P. Shaffer.)

ployed, which selections are obviously embraced in the scope of my invention." Now, a man don't have to describe every way to use his invention. Your Honor is, no doubt, familiar with that.

The Court: Well, the case is not up for argument, get through with the witness.

Mr. Scrivner: Where is this exhibit, have you marked it?

The Clerk: Here is the Court's Exhibit A.

Mr. Scrivner: Now, look at that and state if you know what it is. What is it?

The Clerk: That is Court's Exhibit A.

A. That is a piece of cement, removed from one of the joints of the Owl Drug Company's case.

Q. Now, is that, in your opinion, a yielding or resilient substance?

A. Yes, sir.

Q. Which is termed in the second claim as an elastic material?

A. Yes, sir.

Q. Well now, tell how that operates, how it does, in fact, operate in the device.

Mr. Gallaher: We object to that as having been gone into, both in examination in chief and cross-examination.

The Court: Not with this particular material. Objection overruled.

A. It acts as a cushion in the chain to prevent the shocks of the plates communicated from one to another, and to permit of expansion and contraction of the plates.

(Testimony of James P. Shaffer.)

Mr. Scrivner: Now, as a matter of fact, can, if necessary, the plates constituting the top and the sides of the case, by reason of their unconfined edges, held apart by this stuff, the Court's Exhibit A, and the intervening plastic material you have been shown, in the middle, can these plates vibrate or move in any direction, independently? No difference how small or how great, can one move independently without transmitting its movement to the other plate?

A. Yes, sir.

Q. Upon what do you base that conclusion?

A. I base it on the fact, one fact, that the showcase will stand the ordinary use put to in stores, and the different climatic conditions it is subjected to, which make vibration or expansion or contraction, and the plate will expand or contract. It may be a very small part, and may need a very fine instrument to record the amount of movement there is in there.

Q. Mr. Shaffer, I will ask you, whether there is any other reason that you know and can state to the court why this stuff you have got there makes an elastic joint?

A. It makes an elastic joint for the reason that it is plastic.

Q. In your opinion, does the words "elastic material" mentioned in claim two contemplate that yielding or resilient substances other than felt, referred to in the second claim of the first page of the patent?

A. Yes.

Mr. Scrivner: That is all.

(Testimony of Charles F. Murray.)

CHARLES F. MURRAY, one of defendants, recalled as a witness on behalf of complainant, testified as follows:

Direct Examination

Mr. Scrivner:

Q. Mr. Murray, when did you employ Mr. Smart?

A. About 6 months ago.

Now you have made some change recently, have you, in making these devices?

A. Yes, a little.

Q. When was that?

A. Oh, since he came up here.

Q. Since he came up here you made any as you described this morning?

A. Yes.

Q. Such as you described this morning?

A. Yes.

Q. You have not ceased permanently to make them that way, have you?

A. No.

Q. And you make them both ways now?

A. What do you mean by "both ways"?

Q. With the felt and without felt.

A. Yes.

Q. Do you expect to continue to do so?

A. Yes.

Q. You have no reason now to suppose you will not continue to do so?

A. No, sir.

Q. Now why have you ceased to make them all with felt in the joints—some without felt in the joints? In

(Testimony of Charles F. Murray.)

other words, why do you make them without felt in the joints at all?

A. Because I think it is the best way to make them.

Q. According to your judgment it is the best way?

A. Yes, sir.

Mr. Scrivner: That is all.

Mr. Gallaher: No questions.

The Court: I would like to ask your client a question. Are you done?

A. Yes, sir.

The Court: I would like to ask your client a question.

Mr. Scrivner: Which one?

The Court: Mr. Gallaher's.

Mr. Gallaher: Mr. Murray is the client, not Mr. Smart.

JAMES A. SMART, recalled for further examination by the court, testified as follows:

Direct Examination.

The Court: This substance in the showcases at the Owl Drug Store, do you claim that will get hard?

A. Yes, sir.

Q. How long will it take to get hard?

A. Well, where it is squeezed out to a thin layer, where the glass fits close enough together, as it should be, it will get hard in say about three months, two months—three months—all depends on the heat or the cold, of the weather. In cold weather I would say it would take longer. Where it is thick, for instance, where the cases come apart, the instance over there in

(Testimony of James A. Smart.)

particular, we cemented the cases one night and delivered them next morning. They were absolutely fresh, they were in a hurry for them, and we had to go over there and shove in some cement, without taking the cases apart, filled it in with a putty knife, to hold it until we got a chance to go down some night and do it at night. That is the condition of the case we saw.

Q. How much space is there between the glass, the edge of the glass and the side of the glass in those cases?

A. Ordinarily there should be about one-sixteenth.

Q. How much is there there?

A. Some one-sixteenth and some more, some about one-eighth, where all that cement was in.

Q. Apart?

A. Yes, sir.

Q. And you say that gets perfectly hard?

A. Yes, sir, perfectly hard and brittle.

Q. You say it gets brittle?

A. Yes, sir, it is sandy.

Q. When you mash it down, will it spring back where it was before?

A. No, sir.

Q. It will not?

A. No, sir, it won't spring back. As the glass settles down—as you put the top on, it settles down. If the weather is warm it gradually works out and down to a thin, even surface.

Q. Won't it finally break up and come out?

A. No, sir, unless they move it around a good deal.

The Court: That is all.

(Testimony of James A. Smart.)

Cross-Examination

By Mr. Scrivner:

Q. How long have you been actually making these cases, of that description, where you use nothing but the cement?

A. I have only been making them, practically, since I came up here.

Q. About how long is that, how long has it been since you began the work of making those?

A. I have made them a good many years and experimented, and had men experiment for me.

Q. I understand that, but we are confining ourselves to the art now, what you have been doing here in Fresno. When was the first one you made?

A. The Owl Drug Store was the first of them I made, since I have been here.

Q. When was that?

A. About two months ago, I should judge.

Q. Is that hard and brittle?

A. Some of them are.

Q. Well, that one at the drug store?

A. That one that we took the cement out of—no, because it is fresh.

Q. Well, then there is one at least, that is not hard and brittle?

A. Part of it.

Q. Part of one case where the material is not hard and brittle?

A. Yes, sir.

Q. How do you know how long it will take that particular case, for the joint to get hard and brittle?

(Testimony of James A. Smart.)

A. I can't say how long it would take that particular case.

Q. Now name one particular case here in Fresno where the material has become absolutely hard and brittle?

A. I don't know as there is any hard and brittle, absolutely, that I made.

Q. Well, that is what we are talking about, what you made. You said those you made got hard and brittle.

A. Yes, they do.

Q. Well, where is one of them?

A. They are not here. You asked me when I made them up here.

Q. Yes, and I asked you where one was, where we could go and see it?

A. You can see them down at Los Angeles.

Q. None of them you have made up here in six months are hard and brittle?

A. I have not been here 6 months.

Q. Well, in three months?

A. I have only made them 2 months.

Q. They have not become hard and brittle yet?

A. No, sir.

Q. How did you come to leave the employ of Mr. Weber?

A. Mr. Murray had been after me for about two years to come up here.

Q. What did he tell you he wanted you here for?

A. He wanted me to take care of the business. He said he was old and wanted to quit the business.

Mr. Gallaher: That is all.

The Court: Well, proceed with the argument, gentlemen.

The plaintiff hereby proposes the foregoing as its abstract of the testimony taken in the above entitled cause and prays that the same be allowed and settled by the court pursuant to the provisions of Equity Rule No. 75.

J. J. SCRIVNER, and
GEORGE E. HARPHAM,
Attorneys for Plaintiff.

The foregoing statement is hereby settled and approved by me this 29th day of March, 1917, together with defendant's proposed amendments thereto filed March 23, 1917, which are to be inserted in the printed transcript in their proper place.

TRIPPET,
Judge.

Settled and filed Mar. 29, 1917.

Petition for appeal in due form filed Jany. 30th, 1917, and allowed by order of court, entered Jany. 30th, 1917, on filing an undertaking on appeal for $500.00, and need not be printed in this record.

[TITLE OF COURT AND CONSOLIDATED CAUSES.]

Assignment of Errors.

Now comes the Diamond Patent Company, the plaintiff in the above entitled actions, and files the following assignment of errors upon which it will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and which it will also rely upon in its appeals in the above entitled causes, viz:

First: Error of the court in holding that an injunction should not issue, when it appeared that the defendants had ceased to use the alleged infringing device or devices subsequent to the bringing of the above entitled suits.

Second: Error of the court in holding that the bills of complaint in these causes are without equity and adjudging and decreeing that said causes be dismissed.

Third: Error of the court in holding that the devices made, used or sold by the defendants did not infringe the plaintiff's patent, nor either of the claims thereof.

Fourth: Error of the court in not adjudging and decreeing that the devices made, used or sold by the defendants infringed plaintiff's said patent, and in not granting to the plaintiff the relief prayed for in the bills of complaint on file in said causes.

J. J. SCRIVNER,
G. E. HARPHAM,
Attorneys for the Plaintiff, Diamond Patent Company.

Filed Jan. 30, 1917.

I, Wm. M. Van Dyke, clerk of the United States District Court, hereby certify that the foregoing printed transcript is a full, true and correct copy of such papers and parts of papers as the parties have stipulated shall be printed in the record.

WM. M. VAN DYKE,
Clerk of the U. S. D. C.